MANAGEMENT OF SECURITY INFORMATION

Summary of Issue

This Committee has encountered a series of issues which relate to the designation, handling, and disclosure of information affecting the nation's security (denoted here as "security information").

1. Reform of the security classification system. Various analyses of the classification system have concluded that it permits excessive classification and fails to provide for timely declassification. There has, however, been more agreement on the problems than on their solution.

2. Withholding of security information from the Congress. This Committee's experience has again raised the question of whether the executive branch can refuse to provide information to the Congress, and, if so, under what circumstances. The President's "embargo" on classified information has been lifted, but, in accepting the compromise now in effect, the Committee indicated that it did not necessarily regard the underlying question as having been permanently resolved.

3. Access to security information in the possession of Congress. The future form and effectiveness of Congressional oversight of intelligence will be affected by the extent to which intelligence information is available to all the members of Congress. This question of access is one of the issues presently before the House Committee on Standards of Official Conduct.

4. Public release of security information by Congressional committees. With regard to this matter also, the Committee has indicated that it may recommend future Congressional policies that will not necessarily conform to the Committee's present arrangements with the President and the intelligence community.

5. Public disclosure of security information by individual members of Congress. Unilateral disclosure of such information by members of Congress has been alleged twice in recent years--once by Senator Gravel and, more recently, by Congressman Harrington. The Committee may wish to make recommendations to the House regarding the rights and responsibilities of members of Congress who are privy to sensitive information.

Although each of these issues will be discussed separately, they are intimately inter-related. If the Committee considers each issue in turn, it may also want to ask if all of its recommendations, taken together, combine to constitute a reasonable and coherent policy for the Congress. In so doing, it will be necessary to consider and balance the need to protect the secrecy of sensitive information against the need of both the Congress and the public to be fully informed.

These issues are significant as general matters of Congressional policy. They are particularly important with regard to intelligence mat-

ters which are as controversial as they are sensitive. The Committee's recommendations, if adopted by the Congress, will have obvious consequences for the future relationship between Congress and the intelligence community and for the relationship between members of the Congress and their intelligence oversight committee(s).

Reform of the Security Classification System

Development

The regulations under which documents are stamped "Confidential," "Secret," or "Top Secret" are not based on statute. Instead, the present classification system is the culmination of a series of administrative regulations and executive orders, beginning during World War I.

According to a 1973 study prepared by the House Committee on Government Operations, the first classification categories were established in November, 1917, by General Orders of the American Expeditionary Forces. These orders were soon superseded by regulations issued by the War and Navy Departments.

In turn, departmental regulations were superseded by Executive Order 8381, issued by President Roosevelt in 1940. As authority, FDR cited an act of 12 January 1938, now codified as part of the Espionage Act as 18 U.S.C. 795(a): (see Appendix 1)

> Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment without first obtaining permission of the commanding officer....

By contrast, the executive order encompassed "(a)ll official military or naval books, documents, reports, maps, charts, plans, designs, models, drawings, photographs, contracts, or specifications...." Although the scope of the order apparently exceeded the scope of the statute on which it was based, there is no indication that FDR's order was challenged.

Executive Order 8381 was replaced by a series of executive orders (and regulations issued pursuant to executive orders) in 1942, 1950, 1951, 1953, and 1972.

From 1953 to 1972, the security classification system was based upon Executive Order 10501, "Safeguarding Official Information in the Interests of the Defense of the United States," issued by President Eisenhower on 5 November 1953. As authority for its issuance, the order is prefaced only by the following general statement:

> Now, therefore, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows....

On 10 March 1972, President Nixon issued the executive order currently in force--Executive Order 11652, "Classification and Declassification of Na-

tional Security Information and Material." (see Appendix 2) This order, like its predecessor, includes only a general statement of authority:

> Now, therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, it is hereby ordered....

Statutory and constitutional basis

As these statements of authority imply, the security classification system is not based upon explicit statutory authority. A 1971 study prepared by the Library of Congress for the Senate Foreign Relations Committee concluded:

> The Executive Branch apparently relies primarily on implied constitutional powers of the President and statutes which it claims afford a basis on which to justify the issuance of Executive Order 10501, acknowledging that there is no specific statutory authority for it.

The Department of State has referred with approval to the Report of the (Wright) Commission on Government Security of 1957, which stated:

> While there is no specific statutory authority for such an order or Executive Order 10501, various statutes do afford a basis upon which to justify the issuance of the order.

Among the statutes which have been cited as authority are (1) the Espionage Act of 1917, (2) the National Security Act of 1947, concerning the protection of intelligence sources and methods, (3) the Internal Security Act of 1950, (4) the Atomic Energy Act of 1954, concerning information on nuclear power, and (5) section 634(c) of the Foreign Assistance Act of 1961, as amended, concerning information on foreign aid programs.

The constitutional authority for establishing the classification system is equally inferential. The Wright Commission report cites 3 specific provisions of Article II: Section 1, "The executive power shall be vested in a President of the United States of America"; Section 2, "The President shall be Commander in Chief of the Army and Navy of the United States"; and Section 3, "... he shall take care that the laws be faithfully executed." The Commission then concluded:

> When these provisions are considered in light of the existing Presidential authority to appoint and remove executive officers directly responsible to him, there is demonstrated the broad Presidential supervisory and regulatory authority over the internal operations of the executive branch. By issuing the proper Executive or administrative order he exercises this power of direction and supervision over his subordinates in the discharge of their duties. He thus "takes care" that the laws are

being faithfully executed by those acting in his behalf; and in the instant case the pertinent laws would involve espionage, sabotage, and related statutes, should such Presidential authority not be predicated upon statutory authority or direction.

Yet, the Commission did not conclude that these provisions place the security classification system beyond the potential reach of the Congress. Instead, again according to the Commission report,

> It is concluded, therefore, that in the absence of any law to the contrary, there is an adequate constitutional and statutory basis upon which to predicate the Presidential authority to issue Executive Order 10501. (emphasis added)

In light of this discussion, the following conclusions emerge:

1. The security classification system is established by executive order, not by statute.

2. There is no explicit statutory basis for such an executive order.

3. There are both statutory and constitutional provisions from which the authority for such an order may be inferred.

4. The classification system established by executive order could be superseded by statute.

Criteria for classification

The present classification system has been criticized on the grounds that it permits excessive classification and that it permits documents to remain classified for longer than security requires. The Committee may therefore wish to recommend that the present system be replaced by a new system, established by statute, which will be less susceptible to these weaknesses.

Executive Order 11652 established three security classification categories, as follows:

> (A) "Top Secret." "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(B) "Secret." "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.

(C) "Confidential." "Confidential" refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

As this Committee well knows, these categories have been supplemented by limitations on the distribution of classified information, culminating in the intricate compartmentation system developed by the intelligence community.

If the present classification system permits excessive classification, one reason may be that the above criteria for classification are too broad or vague. The Committee may wish to consider these three definitions to determine if they sanction the classification of categories of documents which should not be classified. If so, the Committee may recommend that the terms be redefined, either by statute or executive order. (for one such attempt, see Sec. 3 of H.R. 8591, attached as Appendix 3) If the Committee takes this position, it might also be advisable for it to indicate how the definitions should be reformulated to be more precise and limiting. This may not prove to be an easy task.

Authority to classify

Alternatively, the Committee may conclude that the problem lies less in the criteria for classification than in the application of these criteria in specific instances.

Executive Order 11952 states in Section 2 that "(t)he authority to originally classify information or material under this order shall be restricted solely to those offices within the executive branch which are concerned with matters of national security, and shall be limited to the minimum number absolutely required for efficient administation."

According to the 1974 Annual Progress Report of the Interagency Classification Review Committee, 17,364 officials were authorized to classify documents, as of December, 1973. The Report notes that more than 59,000 officials had such authority under Executive Order 10501, and that a 71%

reduction in the number of authorized classifiers had been achieved since E.O. 11652 became effective on 1 June 1972. However impressive this reduction may be, the Committee might consider whether the remaining total of more than 17,000 is consistent with the order's stricture that the number "shall be limited to the minimum number absolutely required for efficient administration."

The Committee may recommend, therefore, a further restriction on the number of officials authorized to classify documents--to be implemented either by statute or executive order. For example, the Committee might recommend that the authority to classify be limited to:

1. a fixed number or percentage of the officials in each agency or department responsible for security information; or

2. only those officials occupying certain specified grades or types of positions in each such agency; or

3. only a board or office established within each agency solely for that purpose.

Alternatively, the Committee may conclude that such a recommendation would be impractical or ineffective for one of the following reasons:

1. Documents which are classified because their disclosure would be embarrassing--rather than damaging to the national security--would probably continue to be classified if the authority to classify remains vested in senior officials most sensitive to the reputation of a specific official, agency, or administration.

2. The need to classify a document is often determined by the sources of information it contains, and the originating official is in the best position to know the sources on which he draws and their sensitivity. Supervisory and administrative officials would therefore be less qualified to make classification decisions than their more numberous subordinates.

3. If the number of authorized officials were more strictly limited, it is easy to imagine that, as a matter of asserted bureaucratic necessity, classification decisions would generally be based on the "recommendations" of subordinates or officials close to the document's source. In practice, then, such a restriction could be circumvented, and the more severe the restriction, the greater the incentive for circumventing it.

Penalties

As a third, and related, matter, the Committee may consider the incentives which probably influence officials authorized to classify documents. Section 4 of E.O. 11652 states that:

> Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations. In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative, or to prevent for any other reason the release of information which does not require protection in the interest of national security.... (emphasis added)

However laudable this provision may be, it recognizes that the incentives confronting classifiers encourage them to over-classify, rather than under-classify. By classifying a document, an official can avoid embarrassment, conceal inefficiency or error, or preserve a privileged position. In addition, under the Espionage Act, there are criminal penalties for the public disclosure of information damaging to national security.

The Committee may therefore consider suggesting that administrative or criminal penalties be attached to unwarranted classifications. If such penalties are to be imposed however, it is essential that the classification criteria be specific enough for the guidance of the officials who must apply them. If the criteria are, and of necessity must be, vague and general, the Committee must ask if officials can fairly be held criminally or administratively liable for their caution.

Procedures for declassification

Changing the criteria for classification, limiting the number of officials authorized to classify, and imposing penalties for unnecessary classification are all proposals to restrict the number and kind of documents which are classified in the first place. Should the Committee conclude that such proposals would be impractical or ineffective, it may also or instead consider proposals to limit the effects of over-classification by improving the procedures for declassification and public release.

E.O. 11652 provides that information classified "Top Secret" or "Secret" is to be down-graded to the next lower category at two year intervals, and then declassified after being classified "Confidential" for an additional six years. However, Section 5(b) of the Order also provides for exemptions from the General Declassification Schedule, noting that "(t)he use of the exemption authority shall be kept to the absolute minimum consistent with national security requirements and shall be restricted to the following categories:

> (1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

> (2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.
>
> (3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.
>
> (4) Classified information or material the disclosure of which would place a person in immediate jeopardy."

The Committee is already familiar with intelligence agencies' interpretations of "intelligence sources or methods." The third exemption, concerning "specific foreign relations matter ... essential to the national security," is broad enough to justify almost any exemption, despite the Order's requirement that they "be kept to the absolute minimum."

Therefore, the process of downgrading and eventual declassification is far from automatic. Further, the incentives which encourage excessive classification also serve to discourage declassification.

In a 1957 report, the House Government Operations Committee noted:

> Although an official faces disciplinary action for the failure to classify information which should be secret, no instance has been found of an official being disciplined for classifying material which should have been made public. The tendency to "play it safe" and use the secrecy stamp has, therefore, been virtually inevitable.

A 1972 study by the same committee indicated that not one of the 2,505 reported administrative penalties for violations of security classification regulations was for over-classification. As discussed earlier, one possible remedy would be to increase or enforce penalties attached to unjustified classification, but

> Classification is based upon a determination of risk, whereas declassification is based upon the harder determination of no risk.

De facto declassification will occur when the incentives change, especially when executive officials conclude that public disclosure of classified information would serve some personal or organizational interest. "Leaks" have become a major source of public knowledge about security matters, but they can just as easily contribute to public misunderstanding as to understanding of executive branch policies and intentions.

There is provision in Section 5(c) of the Executive Order for mandatory review of exempted material:

All classified information and material originated after the effective date of this order which is exempted under (B) above from the General Declassification Schedule shall be subject to a classification review by the originating Department at any time after the expiration of ten years from the date of origin provided:

(1) A Department or member of the public requests a review;

(2) The request describes the record with sufficient particularity to enable the Department to identify it; and

(3) The record can be obtained with only a reasonable amount of effort.

This review is to be conducted by the originating department, either at its own initiative or at the request of an individual or agency which must first know that the document exists. The Committee may conclude, therefore, that such a procedure is unlikely to result in the release of documents which would not reflect credit on government policy, performance, or personnel.

Authority to declassify

With this possibility in mind, proposals were made to provide for a review of classification and declassification practices by a body independent of the originating agencies. Such recommendations were made in 1956 by the Coolidge Committee on Classified Information, in 1957 by the Wright Commission on Government Security, and by members of Congress, including Representative Hebert and Senator Roth. (see Appendix 4)

Perhaps in response, the Interagency Classification Review Committee was established in 1972 by National Security Council Directive to "(a) prevent overclassification, (b) ensure prompt declassification in accord with the provisions of the Order (Executive Order 11652), (c) facilitate access to declassified material, and (d) eliminate unauthorized disclosure of classified information." As noted earlier, there has been a major reduction in the number of officials authorized to classify documents since the Committee's creation, although the Committee's independent impact is unknown.

Whatever its effect on classification procedures and policies, the Committee is not authorized to declassify documents on its own authority. Various other proposals have been made to create an independent review board or commission which would have such power. For example, the 1971 Library of Congress study refers to a proposal by Senator Muskie for a seven man board, composed of one member from government, one from the press, and five from the public, all with non-renewable terms. The intent of such proposals is to place declassification authority in the hands of individuals who will not be influenced by either personal or organizational interests.

Such a commission could be required to review the classification of any document upon request by the Congress or the public, or to review the classification of all documents periodically. Alternatively, the Committee could recommend that all documents be declassified automatically after a specified number of years, unless the review board or commission determines that a particular document should remain classified. The burden of proof would thereby be shifted onto those who advocate continued secrecy.

In opposition, it may be argued that mistaken decisions to declassify information could have grave consequences, and that such decisions should not be delegated to any body not directly accountable to one of the coordinate branches of government. The Freedom of Information Act amendments of 1974 provide for in camera judicial review of individual documents to determine if they are properly classified and therefore exempted from disclosure, as provided in 5 U.S.C. 552(b)(1). Such review, however, is necessarily slow and on a case by case basis.

The Committee may conclude, then, that (1) executive review has proven ineffective, (2) judicial review will be inapplicable, except in individual cases, and (3) review by an independent body would be inappropriate. It may recommend, therefore, that the Congress itself become the primary agency for review and release of classified information, perhaps by incorporating this responsibility into the mandate of the committee(s) charged with intelligence oversight, or oversight of each classifying agency. (see, for example, Section 3(b) of H.J.Res. 1131, attached as Appendix 5)

Judging from this Committee's experience, however, such a proposal is certain to arouse strong opposition from the President and the executive agencies concerned. The authority to review classifications is the authority to publicly release national security information, and--as will be discussed in a later section--neither the legislative nor the executive branch will be fully comfortable with an arrangement which leaves the authority solely in the hands of the other.

The Committee may decide, therefore, that a comprehensive reform of the security classification system is difficult to design and unlikely to occur, and that the needs of the Congress and the public can best be served by Congressional assertions of its right to and need for information, as the need arises.

Summary of alternative recommendations

Among the recommendations which the Committee may consider are the following:

1. that the executive order be revised to provide more precise and limited classification criteria and categories;

2. that the Congress create a revised classification system by

statute which would include more precise and limited classification criteria and categories;

3. that there be a further limitation (either by statute or executive order) on the number of executive officials authorized to classify documents;

4. that the administrative penalties for over-classification be increased or enforced more stringently;

5. that the Congress enact criminal penalties for unwarranted classification;

6. that an independent board or commission be empowered to declassify individual documents on request or to act on agency requests that individual documents remain classified beyond the time limits of the General Declassification Schedule;

7. that a committee or committees of the Congress be authorized to declassify or sanction the continued classification of individual documents, in addition to studying and making recommendations about the general management of security information.

Withholding of Security Information from Congress

The authority of the Congress, and its properly authorized committees acting as its agent, to obtain information is generally accepted as a necessary adjunct to its legislative authority. Otherwise, the Congress would be left with the constitutional responsibility to legislate, but without the means to do so wisely.

Therefore, there must be a presumption in favor of a Congressional demand for information unless one of three possible conditions holds:

1. The demand is not plausibly related to an exercise of the Congress' explicit constitutional authority to legislate.

2. The Congress has enacted a statute by which it denies to itself the authority to demand information for some purposes, or of some kinds, or under some circumstances.

3. There is a countervailing constitutional authority on which is based a refusal to meet a Congressional demand for information.

In the absence of one or more of these three conditions, no defense can stand against a Congressional demand for information, without regard to the wisdom of the demand. The President may argue that information (in this case, security information) should be withheld from the Congress because there is a probability that the Congress would release any such information it received, with consequent damage to the nation's security. Or the Secretary of State may argue that information should be withheld from the Congress (in this case, a memorandum concerning the Cyprus crisis) because providing it would seriously demoralize and undermine the Foreign Service and American diplomacy generally.

Both of these arguments are essentially the same: that it is unwise for Congress to demand the information in question. But no matter how right or wrong the President or the Secretary may be, this argument is no basis for refusing a constitutional demand by the Congress, absent one of the three conditions above. Like any other citizen, Secretary Kissinger is obligated to obey the law, including an action taken by the Congress pursuant to its constitutional authority and responsibility. He can either do his duty, however distasteful it may be, or he can violate the law in the name of what he considers to be an overriding principle.

So it becomes necessary to ask if one of the three possible conditions holds as a basis for withholding a particular class of information--information affecting the national security--from the Congress.

Can it be argued generally that a Congressional demand for security information cannot be derived from a constitutionally based power of the Congress? No. The power to investigate has traditionally been recognized as inherent in the power of Congress to legislate. The eminence,

if not the pre-eminence, of the Congress in national security matters is established by the constitutional power of the Congress to declare war, provide for the common defense, and make rules governing the armed forces. Further, the power of the purse extends to national security affairs as well as domestic affairs. Finally, all the national security instruments of the government--including the Department of State, the Department of Defense, and the CIA--are creatures of statute, established by Congress. Whatever Congress can create, it can also direct. Therefore, there is ample authority in the Congress on which can be grounded a Congressional demand for security information.

Can it be argued that this Committee's demands for security information have been made in ways and for purposes which are not constitutionally protected extensions of the Congress' legislative authority? No. Information has been demanded in accordance with the rules of the Committee which in turn has been specifically and duly authorized by the House to make such demands. Further, the record of this Committee's activities will not sustain the assertion that the information has been demanded without any valid legislative purpose. The Committee has stated its intention to make recommendations for legislation. This assertion must be accepted in the absence of any compelling evidence to the contrary.

The first condition, therefore, does not appear to hold.

With regard to the second possible condition, is there any statute by which the Congress has abrogated its authority to obtain security information as part of an investigation from which will flow legislative recommendations? No. The security classification system is a set of administrative regulations, established by executive order, for the guidance and direction of executive branch officials. The Congress has only recognized the existence of this system by references to it in law. And none of these references can reasonably be construed as an act of self-denial by the Congress concerning any information so classified. As Assistant Attorney General Robert Dixon has testified before the Senate Government Operations Committee: "It should be noted that the fact of classification itself does not constitute a sufficient basis for withholding information from a Committee of Congress."

In fact, the espionage statutes concerning disclosure of "information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution," specifically provide that "(n)othing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof." (see Appendix 6)

Also, the Freedom of Information Act, which exempts certain types and classes of information from public disclosure, specifically states that none of these exemptions (including exemption 1 concerning matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy") constitutes "authority to

withhold information from Congress." (see Appendix 7)

There is, then, no statutory basis for a claim that the Congress has acted to deny to itself what it might otherwise obtain. Further, no statute imposing an affirmative obligation on an appointed official, including the Secretary of State, is sufficient as a basis for refusing security information to the Congress, because any such statute must give way to a constitutionally protected authority of the Congress.

The second condition, therefore, does not appear to hold.

Finally, and with regard to the third possible condition, can it be argued that there is a countervailing constitutional basis for withholding security information from the Congress? For example, the constitutionally protected rights to due process and against self-incrimination can, in some circumstances, be sufficient protection against a Congressional demand for information. But such rights are not at issue in the case of security information, information which is produced or possessed by government officials in the course of their official duties.

What countervailing authority could then be cited? Cabinet officers and other agency heads can make no such claim to authority because they have no constitutional standing. If the Secretary of State's job can be abolished by the Congress, he cannot reasonably assert a constitutional authority against the Congress.

So the countervailing authority, if it exists, must be presidential, and it may take one of three possible forms.

First, the authority may be inherent in the President's constitutional position as Commander-in-Chief. The assertion would be that, as an exercise of this authority, the President can deny any information to the Congress if he determines that such refusal would be in the interest of national security.

Second, the authority may be inherent in the President's constitutional responsibility "to take care that the laws be faithfully executed." The assertion would be that the President can withhold information from the Congress on the grounds that providing it would permit excessive Congressional interference with the execution of the laws.

Third, the authority may be inherent in the coordinate constitutional status of the presidency and the need for the presidency to function effectively. In this case, the assertion would be that providing information to Congress would discourage or destroy the confidentiality of communication which the presidency requires.

With respect to a particular Congressional demand for information, the President's position is obviously strengthened if he can assert more than one of these countervailing authorities. Note, for example, the opinion of Chief Justice Burger in United States v. Nixon:

> The President's need for complete candor and objectivity from advisors calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide. (emphasis added)

In light of the argument above, there are at least three possible courses of action available to this Committee and the Congress.

First, the Committee and the Congress may assert its authority to demand security information, arguing that its need to be informed must outweigh any countervailing authority asserted by the President. If such a demand is refused, the Congress may then seek a determination by the Supreme Court. However, as the above quotation suggests, the Court, as presently constituted, is likely to place great weight on the President's need to protect national security secrets.

Second, the Committee may recommend that the Congress enact legislation to clarify and reassert its authority. To do so, however, might be taken as a tacit admission that its constitutional authority is inadequate without specific statutory support. Further, such a bill would likely be vetoed, perhaps with an invocation that it conflicts with the President's constitutionally protected claim to executive privilege. If such a veto were sustained by one-third plus one of either house, it could be interpreted as Congressional acceptance of executive privilege and rejection of its own authority to demand security information, both at the same time.

Third, the Committee may conclude that there is not likely to be a definitive and permanent formula for balancing the competing constitutional interests of the President and the Congress in each case that may arise. If the President will veto and the Supreme Court will reject an unqualified assertion of the Congress' right to demand information, there may be no alternative but to treat the question as a political one--depending in each case on the public credibility of each branch's claim. Such a conclusion would preserve the likelihood of continuing conflicts, but it would also encourage restraint. As one observer has concluded, (see Appendix 8)

> A situation so ambiguous and muddled cannot fail to distress the tidy-minded constitutionalist. And yet there is every prospect that it will continue for some time to come.... Perhaps this is so because, on the whole, a good case can be made out for the proposition that the present imprecise situation is, in fact, reasonably satisfactory. Neither the executive nor the Congress is very sure of its rights, and both usually evince a tactful

disposition not to push the assertion of their rights to abusive extremes. Of such is the system of checks and balances.

Access to Security Information in the Possession of Congress

In principle, any member of the House may examine any records now in the possession of this or any other committee of the House.

House Rule XI(2)(e)(2) provides that:

> All committee hearings, records, data, charts, and files shall be kept separate and distinct from the congressional office records of the Member serving as chairman of the committee; and such records shall be the property of the House and all Members of the House shall have access thereto. (emphasis added)

This provision was originally enacted as Section 202(d) of the Legislative Reorganization Act of 1946. Neither this rule nor the legislative history of the Act suggests any distinction between such records generally and records which contain security information, whether or not so classified under executive order. (see Appendix 9) Presumably, this rule assures access to all records that are subject to a committee's control, even if, for security reasons, they remain in the physical custody of an executive agency--e.g., the CIA.

The fact that information in Congressional files may be classified in itself poses no bar to access by members of the House. Members of Congress are exempted from security clearance investigations as a matter of courtesy and, even if they were not, the Congress could reasonably contend that, as a coordinate branch of government, its members are not subject to executive branch clearance requirements.

However clear the meaning of the House rule may seem to be, the practice of the House's committees has been somewhat different. Most notably, on 17 June 1975, the House Armed Services Committee voted to deny Congressman Michael Harrington access to security information in its files because of his previous violation of a pledge of secrecy made to the Committee. At the same time, the Committee asked the House Committee on Standards of Official Conduct (Ethics) for its guidance as to how such situations should be handled in the future. Both this request and a charge made against Congressman Harrington by Congressman Robin Beard are now pending before the Ethics Committee.

According to a Library of Congress study made earlier this year at the request of Congressman Harrington, there have been no previous instances in which a member of the House was refused access to committee records. However, it appears that the inclination of House committees is to informally discourage, if not refuse, access by non-committee members to security information. This Committee's staff met with Mr. George Murphy, Executive Director of the Joint Committee on Atomic Energy, who stated that no request for access had been made since the Joint Committee's creation almost 30 years ago. If such a request were to be made, it would be directed to the chairman, the implication being that

he might or might not agree to the request. Instead of refusing access, Mr. Murphy suggested that the member might well be referred to the department or agency which had originated the document.

Similarly, when this Committee's staff contacted the staff of the Defense Appropriations Subcommittee concerning its executive session meetings on the CIA budget, we were informed that this Committee's members could only have access to the Subcommittee's files with its approval. Had Rule XI(2)(e)(2) been invoked, it is quite possible that access would have been provided, but the posture of at least these two committees apparently is to discourage access by non-committee members.

It is also the practice of the House for committees to establish the terms and conditions under which its records may be examined. For example, the Armed Services Committee has established rules "to be followed by members of Congress who wish to read classified information in the committee files." (see Appendix 10) It was because of an alleged violation of these rules--specifically, the prohibition against disclosure to "any unauthorized person"--that Congressman Harrington was denied access on a subsequent occasion.

Similarly, the statute creating the Joint Committee on Atomic Energy (see Appendix 11) provides that:

> All committee records, data, charts, and files shall be the property of the Joint Committee and shall be kept in the offices of the Joint Committee or other places as the Joint Committee may direct under such security safeguards as the Joint Committee shall determine in the interest of the common defense and security.

Presumably, however, any conditions on access must not intrude on the constitutional powers and prerogatives of the members of the House.

As indicated earlier, the question of access has only recently become a matter of controversy. Yet the Harrington case suggests that a more active Congressional role in intelligence oversight may well stimulate requests for information by members who do not serve on the appropriate committee(s). Further, the willingness of intelligence agencies to provide the Congress with security information will undoubtedly be influenced by the number of members who might have access to it.

Despite this possibility, this Committee may conclude that Rule XI (2)(e)(2) should not be amended. On the basis of this Committee's experience, the members may decide that the House rules should not be changed in anticipation of a problem that may rarely, if ever, arise, and that the committee(s) charged with future oversight of the intelligence community should adopt the same unofficial policy of discouraging access that has existed without previously arousing controversy.

Alternatively, the Committee may recommend that the House rules be

amended to provide that members shall have access to security information in a committee's files only upon majority vote of the committee. Such a requirement would serve two purposes:

1. the member requesting access would have to provide some reason for wishing access; and

2. having obtained access, the member would be discouraged from making any unauthorized disclosures because his interest in the information would be well known to the committee.

Further, the Committee may recommend that the House rules be clarified as to the authority of a committee to set reasonable terms and conditions on access to its files.

Instead of or in addition to this modification of the rules, the Committee may consider whether members of the House should be subject to some security clearance procedure before being eligible for access to security information. However, it is difficult to conceive that the House could refuse access to any member on the basis of a questionable or adverse report without arousing a storm of protest. Further, a clearance requirement would not preclude the possibility that a member, with the best of intentions, might disclose security information which he or she believes the public has a right to know. This possibility would be particularly strong in the case of information on intelligence activities, on the propriety of which the members of the House have strong and often conflicting opinions. Much of the information in the files of the JCAE would be both difficult to understand and of little public interest. The same is not true of the information now being held by this Committee or of information concerning intelligence generally.

Release of Security Information by Congressional Committees

As discussed above, the security classification system was established by executive order of the President, not by statute. As such, the system constitutes a set of administrative regulations issued for the guidance and direction of executive branch officials. The penalties imposed for violations are administrative sanctions; e.g., Executive Order 11652 states:

> Sec. 13 (B) The head of each Department is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been responsible for any release or disclosure of national security information or material in a manner not authorized by or under this order or a directive of the President issued through the National Security Council.

The Order makes no reference to the Congress. There is no indication in the Order that the Congress is to be bound by the classification system, nor could it be bound as a coordinate branch of government.

There are no provisions in law or in the rules of the House concerning public release of security information by a committee or subcommittee, or by an individual member of Congress.

During the 92nd Congress, for example, Press Secretary Ron Ziegler commented that top secret documents were being provided to Congress "subject to existing congressional rules and regulations covering the handling of classified material." In response to a request by Congressman Moss, the staff of the House Government Operations Committee reported that:

> We find that there are no specific rules or regulations dealing with such sensitive materials that have been incorporated into the House rules.... This is not to say that some individual committees do not have informal practices to govern their handling of such material, such as requiring appropriate security clearances for staff, approved lock safes for classified documents, and other similar procedures patterned after executive branch regulations. However, these procedures are quite different than those referred to by Presidential Press Secretary Ziegler in his statement, apparently misconstruing just what constitutes "rules or regulations" of the Congress in this connection.

When this Committee, by majority vote, released information classified under executive order, it took an action for which no precedent has been found. The Committee subsequently determined that it would make no further disclosures over the specific objections of the President. At the same time, however, the Committee made clear that it might recommend alternative procedures for consideration by the House.

Whatever policy or procedure the House may adopt, release of security information by a Congressional committee would be protected from judicial intervention. In 1936, the District Court for the District of Columbia held that:

> The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded....

In 1936, the same court held, according to the Library of Congress, that "nothing in the Constitution authorizes anyone to prevent the President, the Supreme Court, or the Congress from publishing any statement of its choice."

Further, the "Speech or Debate" clause of the Constitution would immunize the members of a committee as individuals. In light of the Supreme Court's decision in Gravel v. United States, a special Senate committee concluded:

> It would appear, therefore, that the proceedings of any committee with respect to a classified document in its possession will not be questioned for purposes of assessing "regularity" under the Speech and Debate Clause at least where (1) the committee itself is authorized, or (2) the subject matter of the classified document or perhaps the document itself is an issue within the constitutional purview of Congress, or (3) the rights of individuals are not threatened by the committee's proceedings.

In the absence of established procedures or rules, committees of Congress have relied on negotiation to persuade executive branch officials to declassify information and executive session testimony. The procedures to which this Committee has agreed are essentially a formalization of this process, with executive officials being provided with an opportunity to present their reasons for maintaining secrecy and with the final decision left to the President, if he chooses to intervene. The Committee may recommend that these procedures be adopted as the permanent practice of the House.

Alternatively, the Committee may recommend a procedure by which the House or one of its committees may release security information, even over the objections of the originating agency and the President. Among the possible arrangements are the following:

1. The House may grant some or all of its committees the authority to release security information at its own discretion, by vote of a simple or extraordinary majority. The committees may or may not be allowed to delegate this authority to their subcommittees.

2. The House may create a special panel, composed perhaps of members of the various committees dealing with foreign policy and de-

fense matters. This panel would be authorized to release information on the recommendation of a committee of the House.

3. Decisions on disclosure may be submitted by a committee to the party leaders of the House for their unanimous approval.

4. Decisions on disclosure may be left to a vote of the entire House, taken in executive session, upon recommendation of a committee of the House.

Whatever the procedure, the executive branch will almost certainly oppose any arrangement which permits the Congress to disclose security information over the objections of the President. Requiring that a committee's decision by approved by a special panel, by the party leaders, or by the entire House is unlikely to eliminate presidential objections. Providing for some review, hoever, would undermine fears of arbitrary and ill-considered actions by a handful of members who happen to constitute a majority of a House committee at some moment.

Disclosure of Security Information by Members of Congress

In its final report, the House Select Committee on Committees (the Bolling Committee) concluded that "if the highest officials of the executive branch who collect, interpret, and control sensitive information believe that sharing it with Congress will lead to its public disclosure, they will not make it available, even when committees go into executive session to receive such information." (see Appendix 12)

The manner in which the Congress manages security information, therefore, is important both for the security of national secrets and for the ability of the Congress to obtain the willing cooperation of the executive agencies with national security responsibilities. The disclosures associated with Senator Gravel and Representative Harrington suggest that this Committee may wish to make recommendations for procedures which may be followed by members of Congress who believe that public disclosure of specific security information would be in the national interest.

House Rule XI(2)(k)(7), adopted during the 84th Congress, provides that:

> No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee.

This provision has been interpreted to cover all security information in a committee's possession, whether or not obtained during a formal committee meeting or hearing. If a member of the House, therefore, obtains security information from a committee's files, he may not release it without the committee's consent. As already noted, the rules of the House Armed Services Committee specifically provide that members may read its classified files only after signing a pledge that what they learn "will not be divulged to any unauthorized person in any way, form, shape or manner." (see Appendix 10)

If a committee refuses to release information which a member believes the public should have, he is left with three unenviable choices: (1) he may remain silent, (2) he may request that the originating agency declassify the information--an unlikely prospect, or (3) he may release the information unilaterally, under the protection of the "Speech or Debate" clause, which provides that members "shall not be questioned in any other place" for any speech or debate in either house. However, the third course of action does leave a Senator subject to Senate Rule 36.4, which states that:

> Any Senator or officer of the Senate who shall disclose the secret or confidential business or proceedings of the Senate shall be liable, if a Senator, to suffer expulsion from the body; and if an officer, to dismissal from the service of the Senate, and to punishment for contempt.

There is no comparable rule of the House.

With regard to security information in a committee's files, requiring the committee's consent before the information can be released reduces the likelihood of damaging disclosures. However, the Committee may decide that the House rules are now too restrictive in that there is no appeal procedure, should a member and the committee disagree. Alternatively, the Committee may conclude that the committee controlling the information is the best judge of the need for keeping it secret, and that no appeal beyond the committee is necessary.

There are at least three appellate bodies which this Committee might recommend: (1) a special panel of House members created for this purpose, (2) the party leadership of the House, or (3) the House as a whole. (see Appendix 13) For example, the Bolling Committee suggested (but did not officially recommend) that a special committee on intelligence be comprised of the intelligence subcommittees of the Committees on Appropriations, Armed Services, and International Relations. (see Appendix 12) If a member and a majority of a standing committee believe that a document should be released, it would be referred to this special committee for its concurrence. Note that the issue would not reach the special committee without the prior approval of the standing committee in whose files the document rests. This Committee could recommend instead that such a special committee should be created and that a member can request it to approve the release of a document without the prior consent of the standing committee.

According to the Bolling Committee plan, if the special committee agrees that the document should be released, it would then be submitted to the Speaker and Minority Leader for their agreement. If the special committee disagrees with the standing committee, or if the party leaders disagree with both the special committee and the standing committee, then the question would be considered by the full House in closed session.

As this proposal indicates, an appellate system can become quite complex, with several layers of review, up to and including the full House. But the Bolling Committee plan begins with the requirement that the member seeking release of a document first obtain the approval of the standing committee with custody of it. The more difficult situation arises when the committee withholds its consent. This Committee may recommend that, in such cases, the member may appeal to a special committee and/or the party leadership for a reversal of the committee's decision. It may provide further that if an appellate body disagrees with the committee, the final decision would be left to the House. However, the Committee will appreciate that reversing the standing committee's decision would probably be construed as a vote of no confidence in the committee and its expert judgment, and that it would be extraordinarily difficult to submit such a question to the full House with any real hope of preserving secrecy.

The rules of the House are silent with respect to security information obtained by a member of Congress from a source other than a Congressional committee. With regard to public disclosure of security information in such a case, the same kind of options are available. The

Committee may recommend that such information should be released at the member's own discretion or only with the approval of (1) the standing committee with jurisdiction, and/or (2) a special committee, and/or (3) the party leadership. The same review systems could be devised, but the situation would be less delicate in that it would not necessarily involve an initial conflict between a member and a committee.

However complicated the possible combinations of appeals, the underlying questions are simple, but difficult. Should there be a procedure by which an individual member, wishing to release information, can appeal the decision of a committee, wishing to keep it secret? If so, would not any appellate body almost invariably sustain the committee's decision and leave the member no alternative but to remain silent or to release the information under the protection of his constitutional immunity? Whatever the source of the information in question (whether from a committee or another source), the judgment of any committee, special or standing, is unlikely to be reversed on appeal. The tradition of the House is to give considerable deference to the judgment of its committees, especially on matters involving national security policy. This may be reasonable and desirable, but it also suggests the difficulty of establishing an appellate body which will not be perceived by the members to be naturally biased in favor of the committee's position.

Under these circumstances, the Committee must reckon with the real possibility that a member may decide to release security information even over the objections of a standing committee and/or whatever review mechanism may be established. Such an action could readily be taken in a manner which would be protected under the "Speech or Debate" clause. As the Supreme Court concluded in the Gravel case,

> The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.

Therefore, if a member discloses security information in any manner or forum which can reasonably be construed as part of his legislative duties, he would be immune from prosecution. (see Appendix 14)

The member, however, would be subject to disciplinary action by the House or Senate under House Rule XI(2)(k)(7) or Senate Rule 36.4 (in the case of information obtained from a committee) or generally under the constitutional provision that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member" (Article I, Section 5, Clause ii). In In re Chapman (1896), the Supreme Court decided that "(t)he right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member." Presumably, the House has the same discretion, which may result in expulsion or less severe penalties, including censure (so long as the punishment does not impinge on a constituency's right to equal representation).

The history of the House indicates, however, that the House will not censure its members lightly. Only 18 members of the House have ever been censured, and only two members of either house have been censured for unauthorized release of confidential information--Senator Pickering in 1811 and Senator Tappin in 1844. (see Appendix 15) In 1941, Senator Burton K. Wheeler revealed the Navy's occupation of Iceland while the operation was still in progress, but the Senate took no action in that case or in the more recent case of Senator Gravel. (see Appendix 16)

There are other disciplinary actions available to the House, short of censure or expulsion, but it is difficult to devise a penalty which would be appropriate to the offense. Imposing a fine on a member or depriving him of his seniority would be unrelated to the substance of the rule he violated; depriving him of further access to information or of his right to vote in committee or on the floor would deprive his constituents of their right to equal representation in Congress.

Whatever the reticence of the House to discipline its members, there is precedent for such action. As a warning and admonition, the Committee may recommend that the rules of the House be amended to state specifically that unauthorized disclosure of security information by an individual member may be grounds for censure, expulsion, or whatever other action the House deems appropriate. If the Committee makes such a recommendation, it should also consider whether the nature of the information in question, and the circumstances surrounding its disclosure, should be available as an acceptable defense.

The conspiracy provision of said section 34 was also incorporated in section 2388 of this title.

Minor changes were made in phraseology.

AMENDMENTS

1954—Act Sept. 3, 1954, increased the penalty for peacetime espionage and corrected a deficiency on the sentencing authority by increasing penalty to death or imprisonment for any term of years.

TEMPORARY EXTENSION OF WAR PERIOD

Temporary extension of war period, see section 798 of this title.

Section 7 of act June 30, 1953, ch. 175, 67 Stat. 133, repealed Joint Res. July 3, 1952, ch. 570, § 1 (a) (29), 66 Stat. 333; Joint Res. Mar. 31, 1953, ch. 13, § 1, 67 Stat. 18, which had provided that this section should continue in force until six months after the termination of the National emergency proclaimed by 1950 Proc. No. 2914 which is set out as a note preceding section 1 of Appendix to Title 50, War and National Defense.

Section 6 of Joint Res. July 3, 1952, repealed Joint Res. Apr. 14, 1952, ch. 204, 66 Stat. 54, as amended by Joint Res. May 28, 1952, ch. 339, 66 Stat. 96. Intermediate extensions by Joint Res. June 14, 1952, ch. 437, 66 Stat. 137, and Joint Res. June 30, 1952, ch. 526, 66 Stat. 296, which continued provisions until July 3, 1952, expired by their own terms.

INDICTMENT FOR VIOLATING THIS SECTION; LIMITATION PERIOD

Limitation period in connection with indictments for violating this section, see note under section 792 of this title.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

CROSS REFERENCES

Classified information, disclosure by Government official or other person, penalty for, see section 783 (b), (d) of Title 50, War and National Defense and section 798 of this title.

Conspiracy to commit offense generally, see section 371 of this title.

Federal retirement benefits, forfeiture upon conviction of offenses described under this section, see section 8312 of Title 5, Government Organization and Employees.

Forfeiture of veterans' benefits upon conviction under this section, see section 3505 of Title 38, Veterans' Benefits.

Jurisdiction of offenses, see section 3241 of this title.

Letters, writings, etc., in violation of this section as nonmailable, see section 1717 of this title.

Nonmailable letters and writings, see section 1717 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 798, 1717 of this title; title 5 section 8312; title 8 section 1251; title 38 section 3505; title 50 section 825.

§ 795. Photographing and sketching defense installations.

(a) Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment without first obtaining permission of the commanding officer of the military or naval post, camp, or station, or naval vessels, military and naval aircraft, and any separate military or naval command concerned, or higher authority, and promptly submitting the product obtained to such commanding officer or higher authority for censorship or such other action as he may deem necessary.

(b) Whoever violates this section shall be fined not more than $1,000 or imprisoned not more than one year, or both. (June 25, 1948, ch. 645, 62 Stat. 737.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on sections 45 and 45c of title 50, U. S. C., 1940 ed., War and National Defense (Jan. 12, 1938, ch. 2, §§ 1, 4, 52 Stat. 3, 4).

Section consolidated sections 45 and 45c of title 50, U. S. C., 1940 ed., War and National Defense.

Minor changes were made in phraseology.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

EX. ORD. NO. 10104. DEFINITIONS OF VITAL MILITARY AND NAVAL INSTALLATIONS AND EQUIPMENT

Ex. Ord. No. 10104, Feb. 1, 1950, 15 F. R. 597, provided:

Now, therefore, by virtue of the authority vested in me by the foregoing statutory provisions, and in the interests of national defense, I hereby define the following as vital military and naval installations or equipment requiring protection against the general dissemination of information relative thereto:

1. All military, naval, or air-force installations and equipment which are now classified, designated, or marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret", "secret", "confidential", or "restricted", and all military, naval, or air-force installations and equipment which may hereafter be so classified, designated, or marked with the approval or at the direction of the President, and located within:

(a) Any military, naval, or air-force reservation, post, arsenal, proving ground, range, mine field, camp, base, airfield, fort, yard, station, district, or area.

(b) Any defensive sea area heretofore established by Executive order and not subsequently discontinued by Executive order, and any defensive sea area hereafter established under authority of section 2152 of title 18 of the United States Code.

(c) Any airspace reservation heretofore or hereafter established under authority of section 4 of the Air Commerce Act of 1926 (44 Stat. 570; 49 U. S. C. 174) except the airspace reservation established by Executive Order No. 10092 of December 17, 1949.

(d) Any naval harbor closed to foreign vessels.

(e) Any area required for fleet purposes.

(f) Any commercial establishment engaged in the development or manufacture of classified military or naval arms, munitions, equipment, designs, ships, aircraft, or vessels for the United States Army, Navy, or Air Force.

2. All military, naval, or air-force aircraft, weapons, ammunition, vehicles, ships, vessels, instruments, engines, manufacturing machinery, tools, devices, or any other equipment whatsoever, in the possession of the Army, Navy, or Air Force or in the course of experimentation, development, manufacture, or delivery for the Army, Navy, or Air Force which are now classified, designated, or marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret", "secret", "confidential", or "restricted", and all such articles, materials, or equipment which may hereafter be so classified, designated, or marked with the approval or at the direction of the President.

3. All official military, naval, or air-force books, pamphlets, documents, reports, maps, charts, plans, designs, models, drawings, photographs, contracts, or specifications which are now marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret", "secret", "confidential", or "restricted", and all such articles or equipment which may hereafter be so marked with the approval or at the direction of the President.

This order supersedes Executive Order No. 8381 of March 22, 1940, entitled "Defining Certain Vital Military and Naval Installations and Equipment."

Appendix 2

EXECUTIVE ORDERS

take appropriate actions concerning textiles and textile products under Section 204 of the Agricultural Act of 1956, as amended, and Articles 3 and 6 of the Long Term Arrangement Regarding International Trade in Cotton Textiles done at Geneva on February 9, 1962, as extended, and with respect to any other matter affecting textile trade policy.

Sec. 2. (a) The Commissioner of Customs shall take such actions as the Committee, acting through its Chairman, shall recommend to carry out all agreements and arrangements entered into by the United States pursuant to Section 204 of the Agricultural Act of 1956, as amended, with respect to entry, or withdrawal from warehouse, for consumption in the United States of textiles and textile products.

(b) Under instructions approved by the Committee, the Secretary of State shall designate the Chairman of the United States delegation to all negotiations and consultations with foreign governments undertaken with respect to the implementation of textile trade agreements pursuant to this Order. The Secretary of State shall make such representations to foreign governments, including the presentation of diplomatic notes and other communications, as may be necessary to carry out this Order

Sec. 3. Executive Order No. 11052 of September 28, 1962,[22] as amended, and Executive Order No. 11214 of April 7, 1965,[23] are hereby superseded. Directives issued thereunder to the Commissioner of Customs shall remain in full force and effect in accordance with their terms until modified pursuant to this Order.

Sec. 4. This Order shall be effective upon its publication in the FEDERAL REGISTER.

RICHARD NIXON.

THE WHITE HOUSE,
March 3, 1972.

No. 11652

March 10, 1972, 37 F.R. 5209

CLASSIFICATION AND DECLASSIFICATION OF NATIONAL SECURITY INFORMATION AND MATERIAL

The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

Within the Federal Government there is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies. To protect against actions hostile to the United States, of both an overt and covert nature, it is essential that such official information and material be given only limited dissemination.

This official information or material, referred to as classified information or material in this order, is expressly exempted from public disclosure by Section 552(b) (1) of Title 5, United States Code.[24] Wrongful disclosure of such information or material is recognized in the Federal Criminal Code as providing a basis for prosecution.

To ensure that such information and material is protected, but only to the extent and for such period as is necessary, this order identifies the information to be protected, prescribes classification, downgrading, de-

22. 1962 U.S.Code Cong. & Adm.News, p. 4378.
23. 1965 U.S.Code Cong. & Adm.News, p. 4378.
24. 5 U.S.C.A. § 552(b) (1).

classification and safeguarding procedures to be followed, and establishes a monitoring system to ensure its effectiveness.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, it is hereby ordered:

Section 1. Security Classification Categories. Official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed "national security") shall be classified in one of three categories, namely "Top Secret," "Secret," or "Confidential," depending upon the degree of its significance to national security. No other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute. These classification categories are defined as follows:

(A) **"Top Secret."** "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(B) **"Secret."** "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.

(C) **"Confidential."** "Confidential" refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

Sec. 2. Authority to Classify. The authority to originally classify information or material under this order shall be restricted solely to those offices within the executive branch which are concerned with matters of national security, and shall be limited to the minimum number absolutely required for efficient administration. Except as the context may otherwise indicate, the term "Department" as used in this order shall include agency or other governmental unit.

(A) The authority to originally classify information or material under this order as "Top Secret" shall be exercised only by such officials as the President may designate in writing and by:

(1) The heads of the Departments listed below;

(2) Such of their senior principal deputies and assistants as the heads of such Departments may designate in writing; and

(3) Such heads and senior principal deputies and assistants of major elements of such Departments, as the heads of such Departments may designate in writing.

Such offices in the Executive Office of the President as the President may designate in writing
Central Intelligence Agency
Atomic Energy Commission
Department of State
Department of the Treasury
Department of Defense
Department of the Army
Department of the Navy
Department of the Air Force
United States Arms Control and Disarmament Agency
Department of Justice
National Aeronautics and Space Administration
Agency for International Development

(B) The authority to originally classify information or material under this order as "Secret" shall be exercised only by:

(1) Officials who have "Top Secret" classification authority;

(2) Such subordinates as officials with "Top Secret" classification authority under (A) (1) and (2) above may designate in writing; and

(3) The heads of the following named Departments and such senior principal deputies or assistants as they may designate in writing.

Department of Transportation
Federal Communications Commission
Export-Import Bank of the United States
Department of Commerce
United States Civil Service Commission
United States Information Agency
General Services Administration
Department of Health, Education, and Welfare
Civil Aeronautics Board
Federal Maritime Commission
Federal Power Commission
National Science Foundation
Overseas Private Investment Corporation

(C) The authority to originally classify information or material under this order as "Confidential" may be exercised by officials who have "Top Secret" or "Secret" classification authority and such officials as they may designate in writing.

(D) Any Department not referred to herein and any Department or unit established hereafter shall not have authority to originally classify information or material under this order, unless specifically authorized hereafter by an Executive order.

Sec. 3. Authority to Downgrade and Declassify. The authority to downgrade and declassify national security information or material shall be exercised as follows:

(A) Information or material may be downgraded or declassified by the official authorizing the original classification, by a successor in capacity or by a supervisory official of either.

(B) Downgrading and declassification authority may also be exercised by an official specifically authorized under regulations issued by the head of the Department listed in Sections 2(A) or (B) hereof.

(C) In the case of classified information or material officially transferred by or pursuant to statute or Executive order in conjunction with a transfer of function and not merely for storage purposes, the receiving Department shall be deemed to be the originating Department for all purposes under this order including downgrading and declassification.

(D) In the case of classified information or material not officially transferred within (C) above, but originated in a Department which has since ceased to exist, each Department in possession shall be deemed to be the originating Department for all purposes under this order. Such information or material may be downgraded and declassified by the Department in possession after consulting with any other Departments having an interest in the subject matter.

(E) Classified information or material transferred to the General Services Administration for accession into the Archives of the United States shall be downgraded and declassified by the Archivist of the United States in accordance with this order, directives of the President issued through the National Security Council and pertinent regulations of the Departments.

(F) Classified information or material with special markings, as described in Section 8, shall be downgraded and declassified as required by law and governing regulations.

Sec. 4. Classification. Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations. In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative, or to prevent for any other reason the release of information which does not require protection in the interest of national security. The following rules shall apply to classification of information under this order:

(A) Documents in General. Each classified document shall show on its face its classification and whether it is subject to or exempt from the General Declassification Schedule. It shall also show the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use. Material containing references to classified materials, which references do not reveal classified information, shall not be classified.

(B) Identification of Classifying Authority. Unless the Department involved shall have provided some other method of identifying the individual at the highest level that authorized classification in each case, material classified under this order shall indicate on its face the identity of the highest authority authorizing the classification. Where the individual who signs or otherwise authenticates a document or item has also authorized the classification, no further annotation as to his identity is required.

(C) Information or Material Furnished by a Foreign Government or International Organization. Classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government or international organization which furnished the information or material.

(D) Classification Responsibilities. A holder of classified information or material shall observe and respect the classification assigned by the originator. If a holder believes that there is unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification under this order, he shall so inform the originator who shall thereupon re-examine the classification.

Sec. 5. Declassification and Downgrading. Classified information and material, unless declassified earlier by the original classifying au-

thority, shall be declassified and downgraded in accordance with the following rules:

(A) General Declassification Schedule. (1) "Top Secret." Information or material originally classified "Top Secret" shall become automatically downgraded to "Secret" at the end of the second full calendar year following the year in which it was originated, downgraded to "Confidential" at the end of the fourth full calendar year following the year in which it was originated, and declassified at the end of the tenth full calendar year following the year in which it was originated.

(2) "Secret." Information and material originally classified "Secret" shall become automatically downgraded to "Confidential" at the end of the second full calendar year following the year in which it was originated, and declassified at the end of the eighth full calendar year following the year in which it was originated.

(3) "Confidential." Information and material originally classified "Confidential" shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

(B) Exemptions from General Declassification Schedule. Certain classified information or material may warrant some degree of protection for a period exceeding that provided in the General Declassification Schedule. An official authorized to originally classify information or material "Top Secret" may exempt from the General Declassification Schedule any level of classified information or material originated by him or under his supervision if it falls within one of the categories described below. In each case such official shall specify in writing on the material the exemption category being claimed and, unless impossible, a date or event for automatic declassification. The use of the exemption authority shall be kept to the absolute minimum consistent with national security requirements and shall be restricted to the following categories:

(1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.

(4) Classified information or material the disclosure of which would place a person in immediate jeopardy.

(C) Mandatory Review of Exempted Material. All classified information and material originated after the effective date of this order which is exempted under (B) above from the General Declassification Schedule shall be subject to a classification review by the originating Department at any time after the expiration of ten years from the date of origin provided:

(1) A Department or member of the public requests a review;

(2) The request describes the record with sufficient particularity to enable the Department to identify it; and

(3) The record can be obtained with only a reasonable amount of effort.

Information or material which no longer qualifies for exemption under (B) above shall be declassified. Information or material continuing to qualify under (B) shall be so marked and, unless impossible, a date for automatic declassification shall be set.

(D) Applicability of the General Declassification Schedule to Previously Classified Material. Information or material classified before the effective date of this order and which is assigned to Group 4 under Executive Order No. 10501, as amended by Executive Order No. 10964, shall be subject to the General Declassification Schedule. All other infor-

mation or material classified before the effective date of this order, whether or not assigned to Groups 1, 2, or 3 of Executive Order No. 10501, as amended, shall be excluded from the General Declassification Schedule. However, at any time after the expiration of ten years from the date of origin it shall be subject to a mandatory classification review and disposition under the same conditions and criteria that apply to classified information and material created after the effective date of this order as set forth in (B) and (C) above.

(E) Declassification of Classified Information or Material After Thirty Years. All classified information or material which is thirty years old or more, whether originating before or after the effective date of this order, shall be declassified under the following conditions:

(1) All information and material classified after the effective date of this order shall, whether or not declassification has been requested, become automatically declassified at the end of thirty full calendar years after the date of its original classification except for such specifically identified information or material which the head of the originating Department personally determines in writing at that time to require continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy. In such case, the head of the Department shall also specify the period of continued classification.

(2) All information and material classified before the effective date of this order and more than thirty years old shall be systematically reviewed for declassification by the Archivist of the United States by the end of the thirtieth full calendar year following the year in which it was originated. In his review, the Archivist will separate and keep protected only such information or material as is specifically identified by the head of the Department in accordance with (E) (1) above. In such case, the head of the Department shall also specify the period of continued classification.

(F) Departments Which Do Not Have Authority For Original Classification. The provisions of this section relating to the declassification of national security information or material shall apply to Departments which, under the terms of this order, do not have current authority to originally classify information or material, but which formerly had such authority under previous Executive orders.

Sec. 6. Policy Directives on Access, Marking, Safekeeping, Accountability, Transmission, Disposition and Destruction of Classified Information and Material. The President acting through the National Security Council shall issue directives which shall be binding on all Departments to protect classified information from loss or compromise. Such directives shall conform to the following policies:

(A) No person shall be given access to classified information or material unless such person has been determined to be trustworthy and unless access to such information is necessary for the performance of his duties.

(B) All classified information and material shall be appropriately and conspicuously marked to put all persons on clear notice of its classified contents.

(C) Classified information and material shall be used, possessed, and stored only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons.

(D) All classified information and material disseminated outside the executive branch under Executive Order No. 10865 or otherwise shall be properly protected.

(E) Appropriate accountability records for classified information shall be established and maintained and such information and material shall be protected adequately during all transmissions.

(F) Classified information and material no longer needed in current working files or for reference or record purposes shall be destroyed or

disposed of in accordance with the records disposal provisions contained in Chapter 33 of Title 44 of the United States Code and other applicable statutes.

(C) Classified information or material shall be reviewed on a systematic basis for the purpose of accomplishing downgrading, declassification, transfer, retirement and destruction at the earliest practicable date.

Sec. 7. Implementation and Review Responsibilities. (A) The National Security Council shall monitor the implementation of this order. To assist the National Security Council, an Interagency Classification Review Committee shall be established, composed of representatives of the Departments of State, Defense and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the National Security Council Staff and a Chairman designated by the President. Representatives of other Departments in the executive branch may be invited to meet with the Committee on matters of particular interest to those Departments. This Committee shall meet regularly and on a continuing basis shall review and take action to ensure compliance with this order, and in particular:

(1) The Committee shall oversee Department actions to ensure compliance with the provisions of this order and implementing directives issued by the President through the National Security Council.

(2) The Committee shall, subject to procedures to be established by it, receive, consider and take action on suggestions and complaints from persons within or without the government with respect to the administration of this order, and in consultation with the affected Department or Departments assure that appropriate action is taken on such suggestions and complaints.

(3) Upon request of the Committee Chairman, any Department shall furnish to the Committee any particular information or material needed by the Committee in carrying out its functions.

(B) To promote the basic purposes of this order, the head of each Department originating or handling classified information or material shall:

(1) Prior to the effective date of this order submit to the Interagency Classification Review Committee for approval a copy of the regulations it proposes to adopt pursuant to this order.

(2) Designate a senior member of his staff who shall ensure effective compliance with and implementation of this order and shall also chair a Departmental committee which shall have authority to act on all suggestions and complaints with respect to the Department's administration of this order.

(3) Undertake an initial program to familiarize the employees of his Department with the provisions of this order. He shall also establish and maintain active training and orientation programs for employees concerned with classified information or material. Such programs shall include, as a minimum, the briefing of new employees and periodic reorientation during employment to impress upon each individual his responsibility for exercising vigilance and care in complying with the provisions of this order. Additionally, upon termination of employment or contemplated temporary separation for a sixty-day period or more, employees shall be debriefed and each reminded of the provisions of the Criminal Code and other applicable provisions of law relating to penalties for unauthorized disclosure.

(C) The Attorney General, upon request of the head of a Department, his duly designated representative, or the Chairman of the above described Committee, shall personally, or through authorized representatives of the Department of Justice render an interpretation of this order with respect to any question arising in the course of its administration.

Sec. 8. Material Covered by the Atomic Energy Act. Nothing in this order shall supersede any requirements made by or under the Atomic

Energy Act of August 30, 1954, as amended. "Restricted Data," and material designated as "Formerly Restricted Data," shall be handled, protected, classified, downgraded and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and the regulations of the Atomic Energy Commission.

Sec. 9. Special Departmental Arrangements. The originating Department or other appropriate authority may impose, in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information and material, including those which presently relate to communications intelligence, intelligence sources and methods and cryptography.

Sec. 10. Exceptional Cases. In an exceptional case when a person or Department not authorized to classify information originates information which is believed to require classification, such person or Department shall protect that information in the manner prescribed by this order. Such persons or Department shall transmit the information forthwith, under appropriate safeguards, to the Department having primary interest in the subject matter with a request that a determination be made as to classification.

Sec. 11. Declassification of Presidential Papers. The Archivist of the United States shall have authority to review and declassify information and material which has been classified by a President, his White House Staff or special committee or commission appointed by him and which the Archivist has in his custody at any archival depository, including a Presidential Library. Such declassification shall only be undertaken in accord with: (i) the terms of the donor's deed of gift, (ii) consultations with the Departments having a primary subject-matter interest, and (iii) the provisions of Section 5.

Sec. 12. Historical Research and Access by Former Government Officials. The requirement in Section 6(A) that access to classified information or material be granted only as is necessary for the performance of one's duties shall not apply to persons outside the executive branch who are engaged in historical research projects or who have previously occupied policy-making positions to which they were appointed by the President; *Provided*, however, that in each case the head of the originating Department shall:

(i) determine that access is clearly consistent with the interests of national security; and

(ii) take appropriate steps to assure that classified information or material is not published or otherwise compromised.

Access granted a person by reason of his having previously occupied a policy-making position shall be limited to those papers which the former official originated, reviewed, signed or received while in public office.

Sec. 13. Administrative and Judicial Action. (A) Any officer or employee of the United States who unnecessarily classifies or overclassifies information or material shall be notified that his actions are in violation of the terms of this order or of a directive of the President issued through the National Security Council. Repeated abuse of the classification process shall be grounds for an administrative reprimand. In any case where the Departmental committee or the Interagency Classification Review Committee finds that unnecessary classification or overclassification has occurred, it shall make a report to the head of the Department concerned in order that corrective steps may be taken.

(B) The head of each Department is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been responsible for any release or disclosure of national security information or material in a manner not authorized by or under this order or a directive of the President issued through the National Security Council.

Where a violation of criminal statutes may be involved, Departments will refer any such case promptly to the Department of Justice.

Sec. 14. Revocation of Executive Order No. 10501. Executive Order No. 10501 of November 5, 1953,[25] as amended by Executive Orders No. 10816 of May 8, 1959,[25] No. 10901 of January 11, 1961,[25] No. 10964 of September 20, 1961,[25] No. 10985 of January 15, 1962,[25] No. 11097 of March 6, 1963,[25] and by Section 1(a) of No. 11382 of November 28, 1967,[25] is superseded as of the effective date of this order.

Sec. 15. Effective date. This order shall become effective on June 1, 1972.

RICHARD NIXON.

THE WHITE HOUSE,
March 8, 1972.

No. 11653

March 10, 1972, 37 F.R. 5115

EXEMPTION OF JACK T. STUART FROM COMPULSORY RETIREMENT FOR AGE

Jack T. Stuart, United States Marshal for the Southern District of Mississippi reached the age of 70 on February 22, 1972. Under section 8335 of title 5, United States Code, he would be subject to compulsory retirement for age, after 60 days advance notice, unless exempted therefrom by Executive order.

It is my judgment that the public interest would be well served if Mr. Stuart were to be exempted from such compulsory retirement:

NOW THEREFORE, by virtue of the authority vested in me by subsection (c) of section 8335 of title 5, United States Code,[26] I hereby exempt Jack T. Stuart from compulsory retirement for age until May 19, 1975.

RICHARD NIXON.

THE WHITE HOUSE,
March 9, 1972.

25. 50 U.S.C.A. § 401 note.
26. 5 U.S.C.A. § 8335(c).

94TH CONGRESS
1ST SESSION

H. R. 8591

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1975

Mr. STEELMAN introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend section 552 of title 5 of the United States Code to clarify certain exemptions from its disclosure requirements, to provide guidelines and limitations for classifying official information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Freedom of Information Act Amendments of 1975".

DESIGNATION OF INFORMATION AS DEFENSE DATA

SEC. 2. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

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"(f) (1) The Congress finds and declares that the free flow of information among individuals, between the Government and the citizens of the United States, and among the separate branches of Government is essential to the proper functioning of the constitutional processes of the United States. The Congress further finds that certain unwarranted policies and procedures for the classification of information have in the past unduly inhibited this free flow of information, and that in order to correct this situation it is necessary to prescribe certain guidelines and limitations for the classification of information which the President or the head of an agency determines to require limited dissemination in the interest of national defense.

"(2) The President and the heads of those agencies listed under subparagraph (A) of paragraph (5) are authorized to classify as 'Defense Data' any official information originated or acquired by them, the unauthorized disclosure of which could reasonably be expected by the President and heads of authorized agencies to cause damage to the national defense. In no case shall information be classified in order to conceal incompetence, inefficiency, wrongdoing, or administrative error, to avoid embarrassment to any individual or agency, to restrain competition or independent initiative, or to prevent or delay for any reason the release of information

the dissemination of which will not damage the national defense.

"(3) The classification standard for Defense Data (as that which could reasonably be expected by the President and heads of authorized agencies to cause damage to the national defense) may only be applied to the following:

"(A) disruption of foreign relations affecting the defense of the United States;

"(B) compromise of a current operational plan or contingency plan for the defense of the United States against attack, including the related intelligence estimate;

"(C) compromise of a current intelligence operation important to the defense of the United States;

"(D) compromise of an official cryptologic system important to the defense of the United States;

"(E) disclosure of official information regarding a technological development of the Government that is primarily useful for military purposes which disclosure itself would eliminate a known technological advantage of the United States important to the national defense;

"(F) disclosure of official information which disclosure itself would make a current weapon system or

a military operation vulnerable to successful hostile attack or other successful countermeasures; and

"(G) information furnished to the United States by a foreign government or international organization, the unauthorized disclosure of which could reasonably be expected to cause damage to the national defense.

"(4) Except as otherwise provided by law, no designation other than 'Defense Data' may be used to classify information in the interest of national defense.

"(5) (A) Official information may be classified as Defense Data by the heads of the following agencies or designated personnel: the Department of State; the Department of Defense and the military departments; the Department of Transportation; the Energy Research and Development Administration; the Central Intelligence Agency; the National Aeronautics and Space Administration; and such offices within the Executive Office of the President as the President may designate by Executive order.

"(B) Within the agencies described in subparagraph (A), the classification of official information as Defense Data may only be done by the head of each such agency, and such other senior principal deputies, assistants, and subordinate officials within each such agency who are designated in writing by the head of each such agency.

"(C) The President may impose specific limitations

on the delegation of classification authority within agencies so as to limit it to individuals whose operational responsibilities require that they have such authority.

"(D) The head of each authorized agency shall semi-annually review the authority of each individual whom he has designated in writing as having authority to classify official information and shall revoke such designation in the case of any individual whose operation responsibilities no longer require that he have such authority.

"(E) No individual authorized by the head of his agency to classify official information may redelegate such authority to any other individual.

"(F) A person who copies or otherwise reproduces or uses information already classified as 'Defense Data' or directs the copying, reproduction, or other use of such information shall not require classification authority for the purpose of placing or directing the placement of the 'Defense Data' designation on documents or other material containing such information and shall not be delegated classification authority for that purpose.

"(6) Official information shall be classified according to what it reveals and not according to its relationship with or reference to other information or material. No document or other material may be given the 'Defense Data' marking unless it contains or reveals an element of official informa-

tion specifically designated as 'Defense Data' pursuant to this subsection.

"(7) (A) Any document or other material object, including communications transmitted by electrical means, containing or revealing information designated as 'Defense Data' shall be appropriately and conspicuously marked or otherwise identified to show the designation 'Defense Data'.

"(B) The President may prescribe additional protective markings and notations for documents and other material objects containing or revealing Defense Data.

"(8) Official information originated or acquired by an agency and classified as 'Confidential', 'Secret', or 'Top Secret' pursuant to any Executive order shall be subject to the provisions of this subsection. A material item containing such information shall be marked to show that it has been designated 'Defense Data', or to show that it has been declassified and cite this subsection or subsection (g) as authority for such marking.

"(g) (1) (A) Any official information which—

"(i) is classified pursuant to the provisions of subsection (f) after the effective date of such subsection; and

"(ii) at any time thereafter ceases to meet the requirements of subsection (f) (2), or can no longer be

protected against unauthorized disclosure, shall be declassified promptly.

"(B) Except as provided in paragraph (2), any official information which is classified pursuant to subsection (f) on or after the effective date of such subsection and which is not declassified as provided in subparagraph (A), shall be declassified automatically upon the expiration of three years after the end of the month of its classification, regardless of whether the document or other material containing the information has been marked to show the declassification.

"(C) Except as provided by paragraph (2), any official information which was originally classified as 'Confidential', 'Secret', or 'Top Secret' pursuant to any Executive order during the three-year period immediately preceding the effective date of subsection (f), and which is classified as 'Confidential', 'Secret', or 'Top Secret' on such effective date, shall be declassified automatically upon the expiration of three years after the end of the month of the original classification of such information regardless of whether the document or other material containing the information has been marked to show the declassification. If the original date of classification of such information or material is not known, it shall be declassified not later than

the expiration of three years after the effective date of subsection (f).

"(D) Except as provided by paragraph (2), any official information which was originally classified pursuant to any Executive order, directive, memorandum, or other authority prior to the three-year period immediately preceding the effective date of subsection (f), and which continues to be classified on such effective date, shall be declassified automatically upon the expiration of six months after such effective date, regardless of whether the document or other material containing the information has been marked to show the declassification.

"(2) (A) Subject to additional limitations as the President shall prescribe regarding subject matter, any official information which is classified and which is subject to automatic declassification as provided in subparagraph (B), (C), or (D) of paragraph (1) may be assigned a deferred automatic declassification date of not more than two years by the classifying official upon a determination that the information is of such sensitivity and importance to continue to satisfy the requirements for classification as 'Defense Data'.

"(B) The President or the head of an agency may assign a deferred automatic declassification date of more than two years after the date of declassification provided for under subparagraph (B), (C), or (D) of paragraph (1) upon

determination that the classified information continues to satisfy the criterion for classification as 'Defense Data'. For each such item of information for which the President or the head of an agency makes such a determination, he shall submit, in writing, to the Committee on Government Operations of the Senate, the Committee on Government Operations of the House of Representatives, and the Comptroller General of the United States a detailed justification for the continued classification of such information. Both such committees shall compile and print at least annually as a public document all such reports received by them, except that upon recommendation of the President or the head of the agency concerned, such committee may delete from printing any material which itself satisfies the requirements for classification as 'Defense Data'. Each such deletion shall be indicated in the printed document, and the complete document without deletions shall be kept in committee files and made available, upon request, to any Member or committee of Congress. This authority to defer declassification shall not be redelegated by the head of any agency.

"(C) Any information assigned such a deferred automatic declassification date may at any time be declassified in accordance with paragraph (1) (A).

"(h) (1) Subject to such implementing orders as shall be promulgated by the President, the head of each agency

which exercises authority to classify or declassify official information shall prescribe such regulations as he considers necessary or appropriate to carry out the provisions of subsections (f) and (g) of this section, including regulations which prescribe administrative reprimand, suspension, or other disciplinary action for the improper classification of official information or material.

"(2) The Comptroller General of the United States shall monitor the actions taken by agencies to implement and adhere to the policies and provisions of subsections (f) and (g) of this section. To this end the Comptroller General shall perform, among others, the following functions:

"(A) obtain and review agency implementing regulations and those of such subordinate components as may be necessary to determine the effectiveness of agency actions;

"(B) inquire on a periodic basis regarding the need for assignment or retention of the defense data designation on selected documents and other material;

"(C) conduct visits on a periodic basis to observe the practical application of classification and declassification policy and the safeguarding of defense data by officers and employees of agencies;

"(D) investigate, when deemed appropriate, inquiries initiated by private citizens, officers, or em-

ployees of the United States, or any other person concerning any allegation of improper classification of information or material, or concerning any allegation of the failure of any agency, or any officer or employee thereof, to comply with the policies and provisions of subsection (f) or (g) of this section, or any regulation prescribed under this subsection; and

"(E) transmit semiannual reports not later than March 1 and September 1 of each year to the Committee on Government Operations of the Senate and to the Committee on Government Operations of the House of Representatives, setting forth the findings of such reviews, inquiries, visits, and investigations as may have been conducted pursuant to subparagraphs (A) through (D) during the reporting period, as well as any other matters pertaining to the implementation of subsections (f) and (g) which may be of interest to such committees. Such reports also shall contain any recommendations for action by such committees relating to this Act which the Comptroller General may deem appropriate.

"(i) No person may withhold or authorize withholding information or material from the Congress, or from any committee or Member thereof, or from any court of the United States on the basis that such information or material is classified or qualified for classification as 'Defense Data', or

is otherwise classified pursuant to any law, Executive order, directive, memorandum, or other authority.".

ATOMIC ENERGY RESTRICTED DATA

SEC. 3. The provisions of this Act shall not affect any requirement made by or under the Atomic Energy Act of 1954, as amended, regarding the designation and protection of Restricted Data, as defined in that Act.

EFFECTIVE DATE

SEC. 4. (a) Except as provided in subsection (b) the provisions of this Act shall take effect on the first day of the third month that commences after the date of its enactment.

(b) Section 552 (h), as added by section 2 of this title, shall take effect upon the date of the enactment of this Act.

DEFINITION

SEC. 5. As used in this Act the term "information" means knowledge which can be communicated by any means, as set forth in D.O.D. 5200.1–R, Information Security Program Regulation.

SECURITY CLASSIFICATION REFORM BILL

Summary of H.R. 8591, "Freedom of Information Act Amendments of 1975"
(H.R. 8900 and H.R. 9177 are the same as H.R. 8591)

INTRODUCTION: H.R. 8591 was introduced July 11, 1975 by Congressman Alan Steelman, R-Texas. It would replace the Presidential security classification system in Executive Order 11652 with a statutory basis for protecting certain official information in the interest of national defense. H.R. 8900 and H.R. 9177 list additional sponsors.

The bill reflects the fact that Congress has the Constitutional responsibility "to provide for the common defense of the United States." Accordingly, Congress should determine this Nation's policy for national defense secrecy.

LEGISLATIVE PROCEDURE: One of the types of records which federal agencies may withhold from the public under the Freedom of Information Act (5 USC 552) are those referred to as being properly classified for secrecy in the interest of national defense. H.R. 8591 would amend that act by adding the criteria and rules for classifying and holding the information in secrecy. Only official information would be affected.

But whatever H.R. 8591 does to reduce the volume of information being withheld in the name of national defense, it will have no effect on the lawful withholding of records for other reasons, including those withheld in the interest of foreign policy.

SINGLE SECRECY CATEGORY: "Defense Data" would be the single legal designation for information requiring protection to preclude damage to the national defense. This would compare with use of the single term "Restricted Data" to define certain atomic energy information to be controlled for both "common defense and security."

The existing multiple classification system invites excessive secrecy. There is no incentive to distinguish clearly between information which truly requires protection and that which would not damage the national defense.

DEGREES OF PROTECTION: Different degrees of protection for different items of Defense Data would be permitted. The President could provide for using special protective markings and notations such as are used within each existing classification category.

STANDARD FOR SECRECY: Official information could be designated as Defense Data only if its unauthorized disclosure could reasonably be expected to cause damage to the national defense. This would replace the existing broad "national security" standard.

DAMAGE DEFINED: Nine statements of damage that should be avoided are included in the bill. They are intended to cover all the knowledge that could and should be kept secret to preclude damage to the national defense, except Restricted Data. The latter information will continue to be protected under the Atomic Energy Act.

There should be no effort to authorize secrecy for official information on the basis of importance. Any information under the jurisdiction of an individual is important to him. Also, much of the information developed by or for Executive branch agencies is of vital importance to the public.

AUTHORITY TO CLASSIFY: Official information could be designated as Defense Data only by the President, the Departments of State, Defense and Transportation, the Central Intelligence Agency, the Energy Research and Development Administration, the National Aeronautics and Space Administration, and offices in the Executive Office of the President which he may designate. Only such officials in an agency as the agency

(over)

head designates in writing could exercise classification authority.

A person who copies or otherwise reproduces or uses information already classified as Defense Data or directs the copying, reproduction, or other use of such information shall not require classification authority for the purpose of placing the Defense Data designation on documents or other material containing such information. They shall not be delegated classification authority for that purpose.

DECLASSIFICATION: An item of information designated as Defense Data shall immediately become subject to declassification and shall be declassified as soon as it ceases to meet the prescribed standard for secrecy.

Automatic declassification after three years would be specified for Defense Data not previously declassified. But the classifying authority could defer declassification of selected items for two years. After the fifth year, the agency head could defer declassification of an item of Defense Data for a longer period. He would be required to report each such action to the Committee on Government Operations of the Senate and to the Committee on Government Operations in the House of Representatives.

These provisions would apply to information existing when this legislation is enacted as well as information originated after enactment. Also, they reflect the fact that an abundance of testimony before Congressional Committees indicates that after a period of only two years, most information in use has lost whatever secrecy it may have had.

INFORMATION DEFINED: H.R. 8591 would provide for the protection of information, not material items as such. Information would be defined as "knowledge which can be communicated by any means." That definition is used by the Department of Defense.

SECRECY BY CHOICE: The Executive branch would be authorized to strive to keep Defense Data protected in secrecy. But there would be no requirement in this bill for any information to be designated and protected as Defense Data.

GENERAL LIMITATION: No document or other material could be given the Defense Data marking unless it contains or reveals an element of official information specifically designated as Defense Data pursuant to this legislation.

HEAD OF AGENCY DUTIES: H.R. 8591 would reduce drastically the practice of classifying information on a wide basis and letting it remain under classification secrecy for decades. The volume of Defense Data will be small enough that it can be given the degree of control by agency heads that it deserves.

THE PRESIDENT'S RESPONSIBILITY: The President would be required to promulgate implementing orders, but they necessarily would conform with Congressional standards.

MONITORSHIP: The General Accounting Office would monitor implementation of this legislation on the same basis as it monitors other actions of Executive agencies. The Comptroller General would submit periodic reports to the two Congressional Committees on Government Operations.

DOLLAR SAVINGS: Aside from all other beneficial results, savings of $200 million annually could accrue from enactment of H.R. 8591. National defense would not be endangered in any degree whatsoever. In fact, our defense capability could be improved by increased dissemination of scientific and technical information.

UNAUTHORIZED DISCLOSURE: The Criminal Code would remain as the basis to criminalize such disclosures of national defense data as Congress chooses to make unlawful.

(Reproduced and distributed by William G. Florence)

Appendix 4

92D CONGRESS
1ST SESSION

H. R. 9853

IN THE HOUSE OF REPRESENTATIVES

JULY 15, 1971

Mr. HÉBERT (for himself and Mr. ARENDS) introduced the following bill; which was referred to the Committee on Armed Services

92D CONGRESS
1ST SESSION
H. R. 9852

A BILL

To amend the National Security Act of 1947 to provide for a continuing review and study of measures that should be taken with respect to the designation and protection of information within the Department of Defense and certain other agencies which affects the national security.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the National Security Act of 1947 is amended by adding at the end thereof the following new title:

"TITLE V—COMMISSION ON THE CLASSIFICATION AND PROTECTION OF INFORMATION

"ESTABLISHMENT

"SEC. 501. There is established a commission to be

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known as the 'Commission on Information Protection and the National Security' (hereinafter in this title referred to as the 'Commission').

"PURPOSES OF THE COMMISSION

"SEC. 502. (a) The Commission shall conduct a continuing and complete study and review of—

"(1) all laws, rules, regulations, executive orders, and directives relating to the designation and use of, access to, and protection of information affecting the national security possessed by the Department of Defense, the Central Intelligence Agency, and the National Security Agency;

"(2) the status, justification, adequacy, and effectiveness of those laws, rules, regulations, executive orders, and directives in light of the need to maintain a free flow of information and the necessity to provide for the security of the United States; and

"(3) the policies, procedures, and practices of the executive, legislative, and judicial branches of the Federal Government with respect to classifying, reclassifying, declassifying and otherwise controlling and protecting information affecting the national security.

"MEMBERSHIP

"SEC. 503. (a) NUMBER AND APPOINTMENT.—The Commission shall be composed of twelve members as follows:

"(1) Two Members of the Senate appointed by the President pro tempore. Members appointed under this paragraph shall not be of the same political party.

"(2) Two Members of the House of Representatives appointed by the Speaker of the House of Representatives. Members appointed under this paragraph shall not be of the same political party.

"(3) Four appointed by the President from persons whose past or current service in the executive branch of the Government and whose education, training, or experience make them specially qualified to serve on the Commission.

"(4) Four appointed by the Chief Justice of the United States from persons who are specially qualified to serve on the Commission by virtue of their legal or judicial education, training, or experience.

A vacancy in the Commission shall be filled in the manner in which the original appointment was made.

"(b) CONTINUATION OF MEMBERSHIP.—If any member of the Commission who was appointed to the Commission as a Member of Congress leaves that office, or if any member of the Commission who was appointed from persons who are officers or employees of the Government ceases to be an officer or employee of the Government, he may continue as a member of the Commission for not longer than

the ten-day period beginning on the date he leaves that office or ceases to be an officer or employee.

"(c) TERMS.—

"(1) Except as provided in paragraph (2), members shall be appointed for terms of four years.

"(2) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of his term until his successor has taken office.

"(d) PAY AND TRAVEL EXPENSES.—

"(1) Except as provided in paragraph (2), members of the Commission shall each be entitled to receive $200 for each day (including traveltime) during which they are engaged in the actual performance of duties vested in the Commission.

"(2) Members of the Commission who are full-time officers or employees of the United States or Members of Congress shall receive no additional pay on account of their service on the Commission.

"(3) While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses, including per diem in lieu of sub

sistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703(b) of title 5 of the United States Code.

"(e) QUORUM.—Seven members of the Commission shall constitute a quorum but a lesser number may hold hearings.

"(f) CHAIRMAN.—The Chairman of the Commission shall be elected by the members of the Commission.

"(g) MEETINGS.—The Commission shall meet at least once during each calendar year, and at the call of the Chairman or a majority of its members.

"DIRECTOR AND STAFF OF COMMISSION; EXPERTS AND CONSULTANTS

"SEC. 504. (a) DIRECTOR.—The Commission shall have a Director who shall be appointed by the Chairman of the Commission and who shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule.

"(b) STAFF.—Subject to such rules as may be adopted by the Commission, the Director may appoint and fix the pay of such personnel as he deems desirable.

"(c) APPLICABILITY OF CIVIL SERVICE LAWS.—The staff of the Commission shall be appointed subject to the provisions of title 5, United States Code, governing appoint-

ments in the competitive service, and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

"(d) EXPERTS AND CONSULTANTS.—Subject to such rules as may be adopted by the Commission, the Director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5 of the United States Code.

"(e) STAFF OF FEDERAL AGENCIES.—Upon request of the Commission, the head of any Federal agency is authorized to detail, on a reimbursable basis, any of the personnel of such agency to the Commission to assist it in carrying out its duties under this title.

"POWERS OF COMMISSION

"SEC. 505. (a) HEARINGS AND SESSIONS.—The Commission may for the purpose of carrying out this title hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Commission may deem advisable. The Commission may administer oaths or affirmations to witnesses appearing before it.

"(b) POWERS OF MEMBERS AND AGENTS.—When so authorized by the Commission, any member or agent of the Commission may take any action which the Commission is authorized to take by this section.

"(c) OBTAINING OFFICIAL DATA.—The Commission may secure directly from any department or agency of the United States information necessary to enable it to carry out this title. Upon request of the Chairman of the Commission, the head of such department or agency shall furnish such information to the Commission.

"(d) MAILS.—The Commission may use the United States mails in the same manner and upon the same conditions as other departments and agencies of the United States.

"(e) SUBPENA POWER.—

"(1) The Commission shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation by the Commission. Such attendance of witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing within the United States.

"(2) If a person issued a subpena under paragraph (1) refuses to obey such subpena or is guilty of contumacy, any court of the United States within the judicial district within which the hearing is conducted or within the judicial district within which such person is found or resides or transacts business may (upon application by the Commission) order such person to appear before the

Commission to produce evidence or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

"(3) The subpenas of the Commission shall be served in the manner provided for subpenas issued by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

"(4) All process of any court to which application may be made under this section may be served in the judicial district wherein the person required to be served resides or may be found.

"(f) IMMUNITY.—No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to a subpena, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

"REPORTS OF THE COMMISSION

"SEC. 506. The Commission shall transmit to the President and to each House of Congress such interim reports as it deems advisable and shall transmit an annual report to the President and to each House of Congress, the first annual report to be filed not later than the last day, other than a Saturday or Sunday, occurring before July 1, 1972. The first annual report shall contain a detailed statement of the findings and conclusions of the Commission, including its recommendations as to—

"(1) procedures to be taken (pursuant to Executive order or otherwise) within the executive branch of the Government to protect the secrecy of information affecting the national security; and

"(2) procedures to be followed by the courts in the United States (pursuant to rules promulgated by the Supreme Court) in judicial hearings involving information affecting the national security.

The first annual report of the Commission and each subsequent report shall include such recommendations for such other legislative and administrative action as it deems advis-

other legislative and administrative action as it deems

advisable."

Appendix 5

91ST CONGRESS
2D SESSION

H. J. RES. 1131

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 1970

Mr. ADDABBO introduced the following joint resolution; which was referred to the Committee on Rules

JOINT RESOLUTION

Creating a Joint Committee on Classified Information.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of Congress that the public's right to information relating to the activities of the Federal Government may be restricted only in the case of information the disclosure of which would endanger the common defense and security; but it is also the policy of Congress that security classifications may not be used within the Government as a means for suppressing information on governmental affairs about which the public does have a right to know and that means to discover and eliminate misuses of information classification procedures should be established.

I

91ST CONGRESS
2D SESSION
H. J. RES. 1130

SEC. 2. (a) There is hereby created a Joint Committee on Classified Information (hereafter referred to in this joint resolution as the "joint committee"), to be composed of—

(1) the chairman and the ranking minority member of the Armed Services Committee of the Senate and of the House of Representatives;

(2) the chairman and the ranking minority member of the Foreign Relations Committee of the Senate;

(3) the chairman and the ranking minority member of the Foreign Affairs Committee of the House of Representatives;

(4) the chairman and ranking minority member of the Defense Appropriations Subcommittee of the Appropriations Committee of the Senate and of the House of Representatives;

(5) three other Members of the Senate appointed by the President of the Senate; and

(6) three other Members of the House of Representatives appointed by the Speaker of the House of Representatives.

(b) Vacancies in the membership of the joint committee shall not affect power of the remaining members to execute the functions of the joint committee, and shall be filled in the same manner as in the case of the original selection.

(c) The joint committee shall select a chairman and a

vice chairman from among its members at the beginning of each Congress. The vice chairman shall act in the place and stead of the chairman in the absence of the chairman. The chairmanship shall alternate between the Senate and the House of Representatives with each Congress, and the chairman shall be selected by the Members from that House entitled to the chairmanship. The vice chairman shall be chosen from the House other than that of the chairman by the Members from that House.

SEC. 3. (a) The joint committee shall make continuing investigations and studies with respect to (1) the practices and methods used in the executive branch to classify information in the interests of the common defense and security, and (2) suspected uses of such classification procedures within the executive branch for purposes contrary to the public welfare.

(b) The joint committee (1) shall at such times as it finds classification procedures being used for purposes contrary to the public welfare, initiate such action as it deems appropriate in order to prohibit such misuse; and (2) may publicly disclose any classified information the classification of which the joint committee considers not to be merited in the interests of the common defense and security and the disclosure of which the joint committee considers to be in the public interest.

(c) The joint committee shall report to the Senate and the House of Representatives, from time to time, the results of its investigations and studies, together with such recommendations as it may deem desirable. Any department, official, or agency engaged in functions relative to investigations or studies undertaken by the joint committee shall, at the request of the joint committee, consult with the joint committee from time to time with respect to such functions or activities.

SEC. 4. (a) In carrying out its duties, the joint committee or any duly authorized subcommittee thereof is authorized to hold such hearings and investigations; to sit and act at such places and times within the United States, including any Commonwealth or possession thereof, whether the House or the Senate is in session, has recessed, or has adjourned; to require, by subpena or otherwise, the attendance of such witnesses and the production of such books, papers, and documents; to administer such oaths; to take such testimony; to procure such printing and binding; and to make such expenditures as it deems necessary. The joint committee may make such rules respecting its organization and procedures as it deems necessary. No recommendation may be reported from the joint committee unless a majority of the committee is present. Subpenas may be issued over the signature of a cochairman of the joint committee or by any member desig-

nated by him or by the joint committee, and may be served by such person or persons as may be designated by such chairman or member. A cochairman of the joint committee or any member thereof may administer oaths to witnesses.

(b) The joint committee may appoint and fix the compensation of such clerks, experts, consultants, technicians, and clerical and stenographic assistants as it deems necessary and advisable; and, with the prior consent of the heads of departments or agencies concerned and the Committee on House Administration of the House of Representatives and the Committee on Rules and Administration of the Senate, to utilize the reimbursable services, information, facilities, and personnel of any of the departments or agencies of the Federal Government, as it deems advisable. The joint committee is authorized to reimburse the members of its staff for travel, subsistence, and the other necessary expenses incurred by them in the performance of the duties vested in the joint committee other than expenses in connection with meetings of the joint committee held in the District of Columbia during such times as the Congress is in session.

(c) All committee records, data, charts, and files shall be the property of the joint committee and shall be kept in the offices of the joint committee or such other places as the joint committee may direct under such security safe-

guards as the joint committee shall determine to be in the interest of the common defense and security.

SEC. 5. The expenses of the joint committee shall be paid one-half from the contingent fund of the House of Representatives and one-half from the contingent fund of the Senate, upon vouchers signed by the chairman of the joint committee.

CROSS REFERENCES

Publication and sale of photographs of defense installations, see section 797 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 796, 797 of this title; title 50 section 825.

§ 796. Use of aircraft for photographing defense installations.

Whoever uses or permits the use of an aircraft or any contrivance used, or designed for navigation or flight in the air, for the purpose of making a photograph, sketch, picture, drawing, map, or graphical representation of vital military or naval installations or equipment, in violation of section 795 of this title, shall be fined not more than $1,000 or imprisoned not more than one year, or both. (June 25, 1948, ch. 645, 62 Stat. 738.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on sections 45; 45a, and 45c of title 50, U. S. C., 1940 ed., War and National Defense (Jan. 12, 1938, ch. 2, §§ 1, 2, 4, 52 Stat. 3, 4).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Punishment provided by section 795 of this title is repeated, and is from said section 45 of title 50, U. S. C., 1940 ed.

Minor changes were made in phraseology.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title; title 50 section 825.

§ 797. Publication and sale of photographs of defense installations.

On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both. (June 25, 1948, ch. 645, 62 Stat. 738.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on sections 45 and 45b, of title 50, U. S. C., 1940 ed., War and National Defense (Jan. 12, 1938, ch. 2, §§ 1, 3, 52 Stat. 3).

Punishment provision of section 45 of title 50, U. S. C., 1940 ed., War and National Defense, is repeated. Words "upon conviction" were deleted as surplusage since punishment cannot be imposed until a conviction is secured.

Minor changes were made in phraseology.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title; title 50 section 825.

§ 798. Disclosure of classified information.[1]

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section—

The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to

[1] So enacted. See second section 798 enacted on June 30, 1953, set out below.

any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof. (Added Oct. 31, 1951, ch. 655, § 24 (a), 65 Stat. 719.)

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

CROSS REFERENCES

Disclosure of classified information by Government officer or employee, see section 783 (b), (d) of Title 50, War and National Defense.

Federal retirement benefits, forfeiture upon conviction of offenses described under this section, see section 8312 of Title 5, Government Organization and Employees.

Forfeiture of veterans' benefits upon conviction under this section, see section 3505 of Title 38, Veterans' Benefits.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 8312; title 38 section 3505.

§ 798. Temporary extension of section 794.[1]

The provisions of section 794 of this title, as amended and extended by section 1 (a) (29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912, 3 C. F. R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Congress, and acts which would give rise to legal consequences and penalties under section 794 when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for. (Added June 30, 1953, ch. 175, § 4, 67 Stat. 133.)

REFERENCES IN TEXT

Section 1 (a) (29) of the Emergency Powers Continuation Act (66 Stat. 333) as further amended by Public Law 12, Eighty-third Congress, referred to in the text, was formerly set out as a note under section 791 of this title and was repealed by section 7 of act June 30, 1953.

Proc. 2912, 3 C. F. R., 1950 Supp., p. 71, referred to in the text, is an erroneous citation. It should refer to Proc. 2914 which is set out as a note preceding section 1 of Appendix to Title 50, War and National Defense.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title.

§ 799. Violation of regulations of National Aeronautics and Space Administration.

Whoever willfully shall violate, attempt to violate, or conspire to violate any regulation or order promulgated by the Administrator of the National Aeronautics and Space Administration for the protection or security of any laboratory, station, base or other facility, or part thereof, or any aircraft, missile, spacecraft, or similar vehicle, or part thereof, or other property or equipment in the custody of the Administration, or any real or personal property or equipment in the custody of any contractor under any contract with the Administration or any subcontractor of any such contractor, shall be fined not more than $5,000, or imprisoned not more than one year, or both. (Added Pub. L. 85–568, title III, § 304 (c) (1), July 29, 1958, 72 Stat. 434.)

CODIFICATION

Section was added by subsec. (c) of section 304 of Pub. L. 85–568. Subsecs. (a) and (b) of section 304 are classified to section 2455 of Title 42, The Public Health and Welfare. Subsec. (d) of section 304 is classified to section 1114 of this title. Subsec. (e) of section 304 is classified to section 2456 of Title 42.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title.

Chapter 39.—EXPLOSIVES AND OTHER DANGEROUS ARTICLES

AMENDMENTS

1970—Pub. L. 91–452, title XI, § 1106(b)(2), Oct. 15, 1970, 84 Stat. 960, struck out item 837.

1960—Pub. L. 86–710, Sept. 6, 1960, 74 Stat. 808, substituted "Other Dangerous Articles" for "Combustibles" in the chapter heading, "explosives, radioactive materials, etiologic agents, and other dangerous articles" for "dynamite, powder and fuses" in item 832, "Marking packages containing explosives and other dangerous articles" for "Transportation of nitroglycerin" in item 833, "Regulation by Interstate Commerce Commission" for "Marking packages containing explosives" in item 834, and "Administration" for "Regulations by Interstate Commerce Commission" in item 835.

Pub. L. 86–449, title II, § 204, May 6, 1960, 74 Stat. 88, added item 837.

1954—Act June 4, 1954, ch. 261, § 2, 68 Stat. 171, added item 836.

§ 831. Definitions.

As used in this chapter—

Unless otherwise indicated, "carrier" means any person engaged in the transportation of passengers or property by land, as a common, contract, or private carrier, or freight forwarder as those terms are used in the Interstate Commerce Act, as amended, and officers, agents, and employees of such carriers.

"Person" means any individual, firm, copartnership, corporation, company, association, or joint-stock association, and includes any trustee, receiver, assignee, or personal representative thereof.

"For-hire carrier" includes common and contract carriers.

"Shipper" shall be construed to include officers, agents, and employees of shippers.

"Interstate and foreign commerce" means commerce between a point in one State and a point in another State, between points in the same State through another State or through a foreign country, between points in a foreign country or countries through the United States, and commerce between a point in the United States and a point in a foreign

[1] So enacted. See first section 798 enacted on Oct. 31, 1951, set out above.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90–23, § 1, June 5, 1967, 81 Stat. 54.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
----	5 U.S.C. 1002	June 11, 1946, ch. 324, § 3, 60 Stat. 238.

In subsection (b)(3), the words "formulated and" are omitted as surplusage. In the last sentence of subsection (b), the words "in any manner" are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1967—Subsec. (a). Pub. L. 90–23 substituted the introductory statement requiring every agency to make available to the public certain information for former introductory provision excepting from disclosure (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to internal management of an agency, now covered in subsec. (b) (1) and (2) of this section.

Subsec. (a)(1). Pub. L. 90–23 incorporated provisions of: former subsec. (b)(1) in (A), inserting requirement of publication of names of officers as sources of information and provision for public to obtain decisions, and deleting publication requirement for delegations by the agency of final authority; former subsec. (b)(2), introductory part, in (B); former subsec. (b)(2), concluding part, in (C), inserting publication requirement for rules of procedure and descriptions of forms available or the places at which forms may be obtained; former subsec. (b)(3), introductory part, in (D), inserting requirement of general applicability of substantive rules and interpretations, added clause (E), substituted exemption of any person from failure to resort to any matter or from being adversely affected by any matter required to be published in the

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THE EXECUTIVE'S RIGHT OF PRIVACY: AN UNRESOLVED CONSTITUTIONAL QUESTION

JOSEPH W. BISHOP, JR.†

A CONSTITUTIONAL question of the first importance, raised in more or less acute form in practically every administration from Washington's to Eisenhower's, is, singularly enough, still wide open. That question is the constitutional power of the executive to withhold information from the legislature. It seems to be no nearer settlement today than it was in 1792, when President Washington announced the right of the executive to exercise its discretion in communicating executive documents requested by a committee appointed by the House of Representatives "to inquire into the causes of the failure of the late expedition under Major General St. Clair."[1]

A regular reader of the newspapers need reflect but briefly to realize the tremendous political importance of the problem. The files of the executive bulge with documents which Congressmen, from the best and worst motives, are eager to examine and which bureaucrats, also from the best and worst motives, are determined to keep to themselves. Many of these documents, if published, would certainly cause headlines and headaches all across the nation, and some might create a stir in foreign chancelleries—a prospect from which the average legislator, especially if he be up for re-election, shrinks about as much as Brer Rabbit shrank from the briar patch, but which may cause exquisite pain to the executive branch. An example: among the large number of dossiers maintained by the FBI and the various intelligence and security services in the Pentagon there are inevitably some whose subjects are persons of local or national prominence. Many such dossiers contain "derogatory" information[2] which, if portentously attributed by an unfriendly politician to "the

†Deputy General Counsel of the Army, July, 1952 to October 1, 1953; Acting General Counsel in August and September, 1953. Member of the District of Columbia and New York Bars.

1. See BINKLEY, PRESIDENT AND CONGRESS 40-41 (1947). On this occasion, the President found no papers which might not properly be inspected by Congress. But four years later the problem recurred when a committee of the House demanded copies of the instructions and other documents employed in connection with the negotiation of a treaty with Great Britain. This time Washington found that "a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request." 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 128 (1897).

2. The inclusion in a file of such information does not, of course, mean that it is true, or even that the agency thinks it is true. The investigators simply collect all available

files of the FBI," might produce a political explosion. Another example: the files of the State and Defense Departments are naturally full of records of conversations between the governments of the United States and other countries, the disclosure of which might benefit the political fortunes of the Congressmen who disclosed them in approximate proportion to its adverse effect on relations between the two countries. Hence, it is not surprising that legislative demands for information and executive refusals have been so common;[3] what is at first blush surprising is that the conflict has never come to a real head.

As a matter of constitutional theory the problem might as well arise between the executive and the judiciary, or the legislative and the judiciary.[4] The latter problem seems never to have arisen, probably because neither branch has any information, not available to the public, which is of much interest to the other. The former has often been raised—in situations in which the government is, or is said to be, in exclusive possession of relevant evidence—and has given rise to a considerable body of case law. Most such cases have been decided on grounds that throw at best a flickering and feeble light on the main question. Nevertheless, because these cases have been cited as authority,[5] and because it is at least true that there are no better judicial precedents, they merit discussion.

One class of such cases deals with the situation in which a subordinate federal official, directed by a court to disclose official information or produce official records, pleads a departmental regulation forbidding compliance with

material on the subject. Very few politicians (or even ordinary successful people) go through life without a single discreditable incident and still fewer without making an enemy.

3. The executive's right to withhold information has been asserted by such Presidents, in other respects so diverse, as Washington, Jefferson, Jackson, Tyler, Buchanan, Grant, Cleveland, Roosevelt I, Coolidge, Hoover, Roosevelt II, Truman and Eisenhower. These precedents are recapitulated in Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103, 223, 319 (1949).

4. Similarly, an interesting subject for speculation is the possible reaction of a congressional committee to an executive demand for information in the committee's files. In practice, the traffic has been all the other way, although once or twice the executive has politely indicated that it would appreciate information as to the facts on which congressional allegations—*e.g.*, some of Senator McCarthy's figures on Communists in government—were based.

5. See, *e.g.*, 40 OPS. ATT'Y GEN. 45, 49 (1941). In a memorandum to the President, released by the White House on May 17, 1954, Attorney General Brownell made the remarkable and inexact assertion that "Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold [from Congress] the information and papers in the public interest. . . ." N.Y. Times, May 18, 1954, p. 24, col. 2. He cited no cases. The statement, like most of the memorandum, was lifted almost word for word from a law review article which had appeared some years previously, but the author of that article cited no cases either. See Wolkinson, *supra* note 3. Since there appears to be no case in which a court has passed on an executive refusal of a congressional demand for information, the writer must have had in mind cases in which the courts themselves have sought to obtain information from the executive—in which case the statement is still incorrect.

such a subpoena without the previous consent of the head of the department.[6] An act of Congress has long authorized the head of each executive department[7] to "prescribe regulations, not inconsistent with law, for the government of his Department . . . and the custody, use and preservation of the records, papers and property appertaining to it."[8] It is certainly true that the courts have consistently treated this statute as validly authorizing the department head to centralize in himself discretion to grant or withhold information requested by a court; but it is equally true that they have sedulously refrained from passing on "the ultimate reach of the authority of the [department head] to refuse to produce at a court's order the government papers in his possession. . . ."[9] Moreover, these decisions plainly furnish no guidance as to the inherent right of the executive to withhold information from Congress, for they are based on an act of Congress: what Congress hath given, Congress can take away. For example: R.S. 161 could scarcely be invoked to justify a refusal to furnish information to the House and Senate Committees on Government Operations, for since 1928 an act of Congress has provided that any department of the executive shall give them "any information requested of it relating to any matter within the jurisdiction of said Committee."[10] In practice,

6. A number of such cases arose because, before the Eighteenth Amendment, federal law taxed makers and sellers of spirits whose activities might be quite illegal under state law. On several occasions state courts, in the course of efforts to prosecute moonshiners and proprietors of blind tigers, attempted to compel the testimony of the federal gaugers, or the production of Treasury records as to the operations of these criminal taxpayers. The Treasury, which was naturally reluctant to penalize full disclosure to itself, forbade its excisemen to reveal information garnered in the course of their official duties. The validity of its regulation was generally, but not always, upheld until the problem was laid to rest by the decision of the Supreme Court in Boske v. Comingore, 177 U.S. 459 (1900). *E.g.*, Stegall v. Thurman, 175 Fed. 813 (N.D. Ga. 1910); *In re* Lamberton, 124 Fed. 446 (W.D. Ark. 1903). *Contra, In re* Hirsch, 74 Fed. 928 (D. Conn. 1896).

7. The courts seem to make little distinction between the traditional departments and the various agencies created by executive order or statute. *Cf.* Appeal of SEC, 226 F.2d 501 (6th Cir. 1955); Universal Airline, Inc. v. Eastern Airlines, Inc., 188 F.2d 993, 999 (D.C. Cir. 1951).

8. REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1952).

9. United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 467 (1951), and, in particular the concurring opinion of Mr. Justice Frankfurter at 470, 472. See also *Ex parte* Sackett, 74 F.2d 922, 924 (9th Cir. 1935) and cases cited note 6 *supra*. Yet a dictum of Learned Hand, exemplifying the sporadic fallibility of that illustrious judge, cites *Boske v. Comingore* and the other cases referred to in note 6 *supra* for the proposition that it is "lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons. . . ." See United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944).

10. 45 STAT. 996 (1928), 5 U.S.C. § 105a (1952). The statute actually names the Committees on Expenditures in the Executive Department, the predecessors of the present Committees on Government Operations. Despite its apparently unambiguous language, its legislative history can be used to ground a plausible argument that the "information" referred to was intended to include only noncontroversial types which the executive had previously furnished to Congress voluntarily. See Wolkinson, *supra* note 3, at 322-23.

of course, when the executive is dealing with Congress rather than the courts, it does not cite R.S. 161 or any other act of Congress. In such circumstances, the Attorney General invariably asserts a constitutional right, under the principle of separation of powers, to grant or withhold in the executive's unfettered discretion.[11]

Another class of cases deals with the "privilege" of the executive to withhold from the courts certain not very clearly defined categories of information. Although there have been too few of these cases to permit the accumulation of a body of case law clearly drawing the line between privileged and unprivileged matter,[12] secrets which can readily be classified as "military" or "state" do not present much difficulty. Thus, in one of the oldest of such decisions,[13] the administrator of the estate of a deceased spy brought suit to recover salary due for services in that capacity under a secret contract between the deceased and President Lincoln. The Supreme Court affirmed the dismissal of the petition:

> "Public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife. . . . Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."[14]

The latest opinion of the Supreme Court upholding the privilege, *United States v. Reynolds*,[15] involved matters equally easy to recognize as military secrets—official reports dealing with the causes of the crash of an Air Force plane loaded with experimental electronic equipment. But in the few instances that have arisen the courts have been at least reluctant to place within the privilege information which the government desired to keep to itself for reasons other than military or diplomatic. Thus, courts have shown reluctance to treat as privileged the statements of witnesses taken by the FBI in the course of a routine, nonconfidential investigation,[16] or the record of the proceedings of a Naval Board of Inquiry in a similarly commonplace matter.[17]

11. See, *e.g.*, in addition to the Memorandum of Attorney General Brownell, *supra* note 5, the opinion of Attorney General Jackson at 40 Ops. Att'y Gen. 45 (1941), declining to furnish certain FBI reports to the House Committee on Naval Affairs.

12. A number of these cases are collected and discussed in Note, 41 Cornell L.Q. 737 (1956).

13. Totten v. United States, 92 U.S. 105 (1875).

14. *Id.* at 107. But the facts of the *Totten* case do not seem to afford a very good illustration of the principle, for it is hard to see how the disclosure of the existence of the contract could have harmed the national interest, long after the completion of the contract and the extinction of the Confederacy. Of course, if the contract had concerned a power with which the United States had been trying to maintain friendly, or at least diplomatic, relations, the reasoning of the Court would have been more cogent.

15. 345 U.S. 1 (1953).

The majority in the *Reynolds* case, while explicitly disclaiming any intent to pass one way or the other on the inherent constitutional power of the executive to withhold information in its sole discretion, nevertheless stated, just as explicitly, that it is the court, not the executive, which must determine whether the circumstances are appropriate for the claim of privilege: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[18] The knotty problem of how the judge is to make this determination without forcing at least a disclosure to himself was dismissed with no more illuminating answer than a reference to the similar difficulties raised by claims of privilege under the Fifth Amendment.

The apparent contradiction between the Court's statement that the judge must determine the nature of the secret and perhaps overrule a claim of privilege, and its disclaimer of intent to pass on the proposition that the head of an executive department has absolute power to withhold from judicial view documents in his custody, can perhaps be resolved. Presumably the Court thought that, even if the documents were found not to be privileged, there would be no question of actually compelling production of the documents. Instead, the issue to which the doubtful materials referred would be resolved against the government. In the *Reynolds* case, however, the ground of decision was that since the Tort Claims Act incorporates the Federal Rules of Civil Procedure, and since those rules penalize only refusal to produce unprivileged documents, the imposition of even such a penalty for failure to produce privileged documents would subject the sovereign to liability on terms to which it had not consented. Deciding the issue to which the suppressed information related against the government would not, of course, have been exactly the same thing as jailing the Secretary of the Air Force for contempt, and perhaps the Court refused to equate prejudice to the government in its conduct of litigation with physical

16. O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa. 1948), *vacated on other grounds sub nom.* Alltmont v. United States, 174 F.2d 931 (3d Cir. 1949). The government made the somewhat malapropos argument that, since the FBI agents happened to be members of the bar, their reports were covered by the attorney-client privilege. The case presented no question of keeping secret the identity of informers. The privilege of withholding such information has been recognized in cases too numerous to cite. *E.g.*, Scher v. United States, 305 U.S. 251 (1938); United States v. Sun Oil Co., 10 F.R.D. 448 (E.D. Pa. 1950).

17. See Bank Line v. United States, 76 F. Supp. 801, 804 (S.D.N.Y. 1948); *cf.* Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265, 269 (E.D.N.Y. 1943).

The British courts, while according privilege to military and diplomatic secrets, have observed by way of dictum that it could not be claimed merely because disclosure "might involve the Government . . . in parliamentary discussion or in public criticism . . . ." Duncan v. Cammell, Laird & Co., [1942] A.C. 624, 642.

18. 345 U.S. at 9-10. The British Court of Appeals took a similar view in Duncan v. Cammell, Laird & Co., [1942] A.C. 624, 642.

compulsion to produce the document.[19] But a distinction—if the Court intended one—between the threat of contempt proceedings and other forms of pressure is of somewhat dubious validity. It is certain that there have been, and possible that there may be, cabinet officers whose incarceration would be much less inimical to the public welfare than mulcting the public fisc of thumping damages for negligence; it is hard to say that the former is compulsion while the latter is not.

The Court did indeed, in the course of its dissertation upon the scope of the privilege and the consequences of its invocation, distinguish criminal prosecution holdings that the government must play a sort of Truth or Consequences —*i.e.*, it must choose between acquittal of the accused and the production of any relevant material in its possession, even though the government might be clearly entitled to withhold that material from judicial inspection.[20] But it did so simply on the ground that "such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented."[21] In other words, the bedrock on which the decision rests is the concept of sovereign immunity. It contains no implication that there is any other distinction between the application of pressure by threatening the loss of a civil suit and the application of pressure by threatening the loss of a criminal action. Assuming that the government is as interested in enforcing the criminal law as it is in preventing unjustified charges on the Treasury, one seems about as effective a method of compelling the production of information as the other, and both seem to differ in degree rather than kind from coercion by the threat of contempt proceedings—although the latter would no doubt have a more abrasive effect on relations between the executive and the judiciary.[22]

19. See O'Neill v. United States, 79 F. Supp. 827, 830 (E.D. Pa. 1948), *vacated on other grounds sub nom.* Allimont v. United States, 174 F.2d 931 (3d Cir. 1949). There seems to be no case which presents the question of whether a court would attempt to compel actual production of information in the possession of the executive. In all those discussed in this Article, the government was a party, so that—assuming that it had in fact no privilege to withhold the information—the ends of justice could adequately be served by assuming against it the issue on which the requested evidence was alleged to bear.

20. United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); *cf.* Edwards v. United States, 312 U.S. 473, 480 (1941). The *Andolschek* case, a prosecution against employees of the Bureau of Internal Revenue for seeking bribes, did not in fact involve a claim of privilege based on the nature of the particular documents requested (which were official reports by the defendants themselves on the allegedly criminous transactions) but simply another instance in which regulations issued by the Secretary of the Treasury under REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1952) forbade disclosure without his authority.

21. 345 U.S. at 12.

22. The concurring opinion of Mr. Justice Frankfurter in United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951) "assumes," no doubt correctly, that the Attorney General could be reached by judicial process if that were necessary to compel him to disclose information which he is not privileged to withhold. *Id.* at 472-73. *Cf.* Land v. Dollar, 190 F.2d 623 (D.C. Cir. 1951), *motion for stay denied*, 341 U.S. 912 (1951).

Peering darkly through the glass of these judicial precedents, not always very clear nor wholly consistent with one another, one can deduce the following propositions:

(1) Where the government is the defendant in a civil suit, it may be compelled to choose between losing the suit and producing an unprivileged document.

(2) Where the government prosecutes a criminal action, it may be compelled to choose between losing the action and producing any relevant document, even one which is privileged. This may be true where the government is the plaintiff in a civil action.[23]

(3) The courts have had no occasion and no inclination to attempt other methods of compelling the government to produce evidence.

Obviously, none of this is of direct help in determining whether the executive branch has an inherent constitutional right to withhold information from the courts, let alone the Congress. Nor is this paucity of authoritative judicial precedent alleviated by the comparative plethora of *ipse dixits* on both sides of the question. Attorneys General have, not surprisingly, invariably supported the constitutional right of the executive to withhold information from the Congress.[24] Congress, as noted above, has by statute declared its right to require information.[25] And a recent study by a committee of Congress came to the equally predictable conclusion that Congress has constitutional authority to require the heads of executive agencies to release information upon terms and conditions prescribed by Congress.[26] The same committee, indeed, assembled a panel of learned professors and eminent counsel, all of whom espoused similar views—although they did so on grounds of polity and expediency, for, unlike the Attorneys General, they frankly recognized the absence of authoritative judicial precedent.[27]

23. See Bank Line v. United States, 76 F. Supp. 801, 803 (S.D.N.Y. 1948).

24. *E.g.*, the Memorandum of Attorney General Brownell, *supra* note 5; 40 OPS. ATT'Y GEN. 45 (1941); 25 OPS. ATT'Y GEN. 326 (1905).

25. 45 STAT. 996 (1928), 5 U.S.C. § 105a (1952). See note 10 *supra*. On the other hand, section 3(c) of the Administrative Procedure Act, providing that matters of official record shall be made available to proper persons "except information held confidential for good cause found," seems to recognize a right to withhold information. 60 STAT. 238 (1946), 5 U.S.C. § 1002(c) (1952). The trouble is, of course, that the act omits to say who is to find the good cause.

26. See Study by the Staff of the House Committee on Government Operations, *The Right of Congress to Obtain Information from the Executive and from Other Agencies of the Federal Government*, 26 (Committee Print, May 3, 1956); Memorandum on *Proceedings Involving Contempt of Congress and its Committees*, 80th Cong., 2d Sess. 15 (printed for the use of the Committee on the Judiciary, January 6, 1948); Note, 43 GEO. L.J. 634, 647-48 (1955).

27. See *Hearings Before the Subcommittee on Availability of Information from Federal Departments and Agencies of the House Committee on Government Operations*, 84th Cong., 2d Sess., pt. 3 (1956).

The chances are not particularly good that the courts will soon be called upon to decide squarely whether the executive can properly resist a congressional demand for information. The question is essentially whether such resistance amounts to a punishable contempt of Congress; and there seem to be in the last analysis but two ways by which that question can be brought squarely before the courts. In the first place, such a contempt might be dealt with by prosecution under the statute which denounces as a misdemeanor refusal to appear or produce papers when required by either house of Congress,[28] and the corollary provision which makes it the duty of the appropriate United States attorney to present to a grand jury instances of such refusal certified to him by the House or Senate.[29] Although the President and the heads of executive departments have repeatedly, and sometimes brusquely, rejected such congressional demands, Congress seems never to have reported such a case to the United States Attorney, nor has the Attorney General ever on his own motion caused one of them to be prosecuted under this statute. It seems, somehow, improbable that he ever will—even if the administration should change immediately after the refusal. Executive *esprit de corps* appears to be stronger than loyalty to party shibboleths: the present administration, for example, has shown itself at least as intransigent as its predecessors in this respect, to both Republican and Democratic Congresses.[30] Even if Congress should certify such a case to a United States Attorney, it seems intrinsically likely that the Attorney General would take the position that Congress could not constitutionally command its prosecution.

Secondly, Congress undoubtedly has power to punish contempts without invoking the aid of the executive and the judiciary, by the simple and forthright process of causing the Sergeant at Arms to seize the offender and clap him into the common jail of the District of Columbia or the guardroom of the Capitol Police;[31] and the prisoner can then, of course, try out the propriety of

28. Rev. Stat. § 102 (1875), as amended, 2 U.S.C. § 192 (1952). Prosecutions under the statute have, of course, multiplied prodigiously since Congressmen discovered the delights of investigations. Although the act goes back to 1857, the Annotation reveals but two prosecutions under it in its first seventy years. 2 U.S.C.A. § 192 (Supp. 1955).

29. Rev. Stat. § 104 (1875), as amended, 2 U.S.C. § 194 (1952).

30. Quite aside from the great McCarthy imbroglio which produced Mr. Brownell's celebrated memorandum (see note 5 *supra*), see, *e.g.*, N.Y. Times, June 30, 1955, p. 1, cols. 6-7; March 27, 1956, p. 20, col. 3. Within a year of its accession to power, the present administration was interposing between Senator McCarthy and the security files of individual employees the same Truman directives which had been the target of so many Republican oratorical salvos.

31. Jurney v. McCracken, 294 U.S. 125 (1935); McGrain v. Daugherty, 273 U.S. 135 (1927); see Memorandum on *Proceedings Involving Contempt of Congress and its Committees*, *supra* note 26. The District of Columbia jail is no pleasure resort, especially in summer, and the Capitol guardroom is probably not much more agreeable. Normally, of course, even in the case of private persons, Congress has preferred the more convenient and conventional method of referring alleged contempts to the Department of Justice for prosecution in the courts. See, *e.g.*, United States v. Kleinman, 107 F. Supp. 407, 408 (D.D.C. 1952).

the action by seeking a writ of habeas corpus. Such an episode—assuming that the information sought by Congress bore some reasonable relation to its constitutional functions[32] or, in the case of a committee of Congress, to the scope of the committee's jurisdiction[33]—would furnish the courts an admirable occasion to decide the precise question of the constitutional authority of the executive to withhold the desired data. But it is not likely to arise. Congress has never in the past been willing to push matters to the point of dispatching the Sergeant at Arms to cleave a path through the Secret Service cordon and seize the person of the President, or even one of his subordinates.[34] Not even Theodore Roosevelt, at his most pugnacious, could succeed in provoking the Senate into such extreme measures.[35] It is more than likely that Congress never will resort to them.

It is, however, conceivable that the Supreme Court may yet be called upon to face the closely related and logically indistinguishable question of the executive's power to reject a judicial subpoena. If, in litigation to which the government is not a party, a court becomes convinced that a document in the possession of the government is relevant, and if it somehow manages to satisfy itself that that information is unprivileged, and if the determination to withhold is made by a department head so that there is not presented the situation of a subordinate taking shelter behind a departmental directive,[36] the courts may yet have to decide the ultimate reach of the executive's discretion to grant or withhold information.[37] But there are plainly too many ifs to make the hypothetical a probability, especially when one considers the acrobatic agility which the courts have so far displayed in dodging the question.

The upshot of this judicial abstention is, of course, that the executive enjoys by pragmatic sanction, if not constitutional law, discretion to decide what in-

32. *Cf.* Kilbourne v. Thompson, 103 U.S. 168, 190 (1880). Modern commentators would give Congress more leeway in the exercise of the investigative power than is suggested by some of the language in the *Kilbourne* case. See, *e.g.*, Fairman, Mr. Justice Miller and the Supreme Court 332-34 (1939). But the Supreme Court's most recent word on the subject leaves no doubt that there are constitutional limits—however imprecise—on Congress' power to inform itself. See United States v. Rumely, 345 U.S. 41, 46 (1953).

33. *Cf.* United States v. Lamont, 236 F.2d 312 (2d Cir. 1956).

34. The Daugherty of McGrain v. Daugherty, 273 U.S. 135 (1927), was not the Attorney General of fragrant memory, but his brother, Mally S., whose involvement in Harry M.'s transgressions had been solely in a private capacity.

35. See Butt, The Letters of Archie Butt 305-06 (1924).

36. See United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951), and text at note 9 *supra*.

37. It has been held in a suit between two airlines that a court may compel a Civil Aeronautics Board inspector to testify to *facts* observed by him in his official capacity, either by deposition or in person. The CAB disclaimed, however, any objection to such testimony; and the court agreed with the Board's contention that "it is error to compel an agent of the Board to produce any of the Board's reports, orders, or private files or to testify as to the contents of such private papers." Universal Airline, Inc. v. Eastern Airlines, Inc., 188 F.2d 993, 1000 (D.C. Cir. 1951).

formation shall be released to Congress. Notwithstanding the battery of authorities assembled by the House Committee on Government Operations,[38] the continuation of this state of affairs does not seem inimical to good government. In fact, it is the view of the writer that, whereas the present situation is quite tolerable, unlimited congressional access to executive information (whether "secrets of state" or merely "official information"[39]) would almost certainly be intolerable. A number of practical considerations support these propositions:

(1) There is little reason to believe that, in practice, the lack of an absolute power to compel the executive to produce information appreciably handicaps Congress in the exercise of its legislative function. It is obvious that in a large majority of cases it is greatly to the advantage of the executive to cooperate with Congress, and in a large majority of cases it does so. Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information, for it is well aware that such a rejection increases the chance of getting either no legislation or undesired legislation.

(2) Congress may not be a safe repository for sensitive information: there can be no guarantee that information coming into the hands of Congress or the whole membership of one of its major committees will long remain secret.[40] Most Congressmen are, of course, quite as trustworthy as most executive officials, but there can be no "security program" for legislators. There is no assurance, if our democracy is to be maintained, that so large a body of men will not include a percentage, to be expected on statistical grounds, of subversives, alcoholics, psychopaths and other security risks, and no assurance that the seniority system will not place such a security risk in the chairmanship of an important committee. Even legislators of high respectability have been known, in the heat of partisan passion, to place the national interest a very poor second to considerations of faction.[41] If these premises are granted, it follows that, as a practical matter, Congress ought not to be given an absolute right of access to military and diplomatic secrets. If such a right existed, it

38. See note 27 *supra*.

39. One of the experts assembled by the House Committee on Government Operations proposed that Congress be given unlimited access to information other than "state" (*i.e.*, military or diplomatic) secrets, and that an independent "Government Information Commission" be created to pass on executive claims that matter requested by Congress falls within the category of "state secrets." See *Hearings, supra* note 27, at 462-65.

40. See, *e.g.*, 94 Cong. Rec. 5724 (1948). It has been held that the judiciary cannot restrain Congress from publishing any information in its possession, because to do so would go counter to the doctrine of separation of powers. Hearst v. Black, 87 F.2d 68, 71-72 (D.C. Cir. 1936); Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729, 731-32 (D.D.C. 1956). These cases involved the confidential information of private citizens, but the rationale seems applicable to information obtained from the executive.

41. For example, in 1941 Senator Burton K. Wheeler, an extreme isolationist, revealed the Navy's occupation of Iceland while the operation was still in progress and the ships involved vulnerable to attack by submarines. See 2 Morison & Commager, The Growth of the American Republic 669 (3d ed. 1942).

severely taxes one's faith in legislative moderation to foresee Congress practicing self-denial to the point of refusing to peek at information on the mere say-so of a bureaucrat, or even of an independent "Government Information Commission,"[42] that such information is a military or diplomatic secret.

(3) There are serious weaknesses in the assumption, popular among liberals who happen at the moment not to be thinking about Senator McCarthy, that public policy ought to draw a sharp distinction between "military and diplomatic secrets" on the one hand and all other types of official information on the other, giving Congress free access to the latter.[43] In the first place, the line is by no means easy to draw, even when the best of faith is used: there is not much information in the files of the State and Defense Departments—of a sort likely to attract congressional interest—which could not with some plausibility be given a security classification, if the executive wished to withhold it on that ground. More fundamentally, however, the executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberations incidental to the making of policy decisions.[44] Undoubtedly the official who makes such a decision should be answerable to Congress for its wisdom. But the subordinate civil servants who advise him should be answerable only to him—*i.e.*, they should be able to present unpalatable facts and make unpopular arguments without fear of being dragooned by the first Congressman who needs a headline.[45] This principle is applicable to many government decisions; it finds what is probably its most compelling illustration in the operation of the employee security system. The power to discharge an alleged security risk resides in the head of a department; his is the decision and his the responsibility to Congress. If the department head is conscientious, as is often the case, he personally studies such

42. See note 39 *supra*.

43. See *Hearings, supra* note 27, at 462-63.

44. The Deputy Attorney General recently stated that the policy of the Department of Justice "does not permit disclosure of staff memoranda or recommendations." See 58 Pub. Util. Four. 319, 320 (1956).

45. "Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications or any documents or reproductions concerning such advice be disclosed, you will instruct employes of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions...."

Letter from the President to the Secretary of Defense, May 17, 1954, N.Y. Times, May 18, 1954, p. 24, col. 1. The weight of this consideration seems to have become apparent only in comparatively recent years. So astute a commentator as Wigmore, for example, completely overlooks it. See Wigmore, Evidence § 2378a (3d ed. 1940).

cases before deciding. But obviously he cannot start from scratch with an undigested mass of papers; he must have advice. In the Army, as elsewhere, such cases are reviewed by screening boards, which make recommendations to the Secretary. A *casus belli* in the Army-McCarthy Armageddon was the Army's repulse of the Senator's attempt to subpoena individual members of these boards and cross-examine them to find out who had voted to clear employees whom the Senator termed subversive.[46] It is obvious that if the Senator had managed to stage this Roman holiday the usefulness of the security review system would have virtually ended, for it would have taken a man of quite exceptional hardihood and integrity to exercise his judgment unaffected by the Senator's hot breath on the nape of his neck. It is one thing for a cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a highly vocal section of the public; it is quite another thing for a middle aged, middle-ranking civil servant, who needs his job, to do so. The Secretary's own responsibility to Congress for wrong decisions is a sufficient guarantee that he will not long tolerate incompetent or disloyal advisors; and he is certainly in a much better position to detect such undesirables than is any member, or even any committee, of Congress.

The other side of the case was eloquently stated by Professor Bernard Schwartz, testifying before the Subcommittee on Government Information of the House Committee on Government Operations. He said:

> "[T]he overriding danger is not congressional abuse but the vesting of unfettered discretion in the executive to surround with secrecy all its activities.
>
> "....
>
> "Those who are concerned with the possibility of legislative abuse ignore the overriding peril of the present century, that of the superstate with its omnipotent administration, unrestrained by any checks on its all pervasive regulatory activities, so vividly pictured by George Orwell in his novel 1984. The great danger today is 1984, not Senator McCarthy. If the elected representatives of the people assert their right to lay bare all that goes on within the executive, that danger may be avoided. An executive whose abuses and inadequacies are exposed to the public eye can hardly become a menace to constitutional government."[47]

The plain and short answer to this is that neither can there be a menace to constitutional government by an executive which has to go to Congress for every cent it spends, which has no power by itself to raise and maintain armed forces and which cannot jail its citizens except under a law passed by Congress and after proceedings presided over by an independent judiciary. These are the factors that make the essential difference between an American President and Big Brother—not whether Senator McCarthy is or is not allowed to prospect in the security files of charwomen, junior clerk-typists and building

46. The Army based its refusal on directives of President Truman which, not having been revoked by the new administration, were still in force, notably his directive of March 13, 1948. 13 Fed. Reg. 1359 (1948).

47. *Hearings*, *supra* note 27, at 465.

guards. Moreover, on the pragmatic basis of the experience of the last decade or so, the proposition that Congress is the paladin of civil liberties and the executive their foe seems at least debatable.

In practice, of course, as has already been suggested, the executive has not "unfettered discretion . . . to surround with secrecy all its activities."[48] All but a minute percentage of congressional requests for information are honored promptly and even with a show of cheerfulness, for the very good reason that the executive needs from Congress cooperation which it will not get without reciprocating.

A brief consideration of the generally satisfactory *modus vivendi* which has evolved may help to dispel the picture of the executive branch in the character of Domitian. There is, of course, no statute that sets standards for the release of information to Congress, and only sporadically, as in the case of security files, are there formal executive regulations. Usually, the head of a department has an aide—often his general counsel—who is responsible for what is bureaucratically known as "legislative liaison." The aide controls the flow of information to Congress, referring only the hottest questions to his boss. Of course the abilities and views of these virtuosi vary widely, and most of them play by ear, but, according to the writer's observation, the most experienced of them agree on certain fundamental policies. These policies may be briefly summarized, as follows:

(1) *No fishing expeditions are allowed.* The initiators of a congressional investigation (who, in practice, are often members of committee staffs rather than the Congressmen themselves) must define with reasonable precision the general area which they intend to investigate and the character of the documents they wish to see.

(2) *No "raw" files are to be released.* The files requested will be screened by the legislative liaison officer or one of his assistants, who will remove any documents which, in his judgment (or, as in the case of individual security files, because of directives of higher authority) should not go outside the executive branch. There can be no blinking the fact that this affords an opportunity for serious abuse. It is entirely justifiable and sometimes necessary to remove, for example, genuine military or diplomatic secrets, or documents identifying confidential informants, or confidential data respecting costs or production techniques furnished by private business.[49] It is arguably justifiable, for the reasons outlined above, to remove recommendations on policy made by subordinate officials, or documents (besides the above-mentioned individual security data) containing allegations which, although unsubstantiated,

48. *Ibid.*

49. Compare the recent action of the Department of Justice in refusing to give the House Committee on the Judiciary access to the files relating to settlement of the anti-trust suit against American Telephone and Telegraph Company. The Deputy Attorney General said that such action "would violate the confidential nature of settlement negotiations" and "discourage defendants, present and future, from entering into such negotiations." See 58 Pub. Util. Fort. 319, 320 (1956).

might work irreparable injury to private reputations. But it is most certainly unjustifiable to remove part of a file simply because it betrays administrative stupidity or inertia. The temptation to indulge in just such an abuse is, of course, considerable. The only answers to this objection are *first*, that the risk of abuse and consequent prejudice to efficient government which it raises is on the whole less than the risk inherent in giving Congress free access to executive files; and *second*, that in practice, competent department heads sooner or later learn the truth of the homely maxim about honesty as a policy in their dealings with Congress. It pays better to admit errors and correct them than to deny their existence; Congress, when it embarks on an investigation of an executive abuse, usually has other sources of information—*e.g.*, disgruntled contractors or bidders—than the files of the executive, and these other sources, if untempered by complete disclosure, are likely to make matters look much worse than they really are.

(3) *Congressional recipients of classified information must themselves be subjected to a security check.* Committees of Congressmen and their aides are, of course, constantly given access to military and diplomatic secrets. The Department of Defense applies to members of committee staffs the same criteria which it applies to its own employees and grants them appropriate clearances, the committee chairman being always formally reminded of the statutes and regulations applicable to any such information transmitted. Congressmen themselves are a more delicate problem. The executive is naturally reluctant to say outright that a member of a coordinate branch of government is not regarded as a proper person to be trusted with his country's secrets—although it has done so on occasion.[50] Seniority may bring a security risk to the chair of an important committee or subcommittee. Fortunately, this has never happened; if and when it does, great finesse will be required to solve the resulting problems of committee access to executive information.

(4) *The executive should have a chance to comment on any resulting committee report before it is published.* The more responsible committee chairmen usually agree to some such arrangement, the utility of which is obvious. Bona fide mistakes can be eliminated in this way, and both sides of a disputed question brought out. A committee is, of course, under no obligation to submit its drafts to such a preview or, if it does so, to accept any of the executive's comments and suggestions. Some chairmen are unwilling to permit their reports to be inspected before they are made public—perhaps because they feel it wasteful to dull a sparkling, sensational allegation by exposing it to lackluster facts.

These principles are, of course, primarily designed for dealing with responsible committees, who are trying to fulfill a legislative function beyond the mere capture of headlines. Rules for dealing with the guerillas, the Congressional Comanches, are naturally far harder to formulate. Still, there are one or two basic, simple principles which, based on the experience of the present writer,

50. Representative Robert L. Condon of California was barred from a test of nuclear weapons in May, 1953. See N.Y. Times, July 6, 1953, p. 12, col. 1.

the executive ought as a general thing to employ in dealing with the irresponsibles. For example, the brunt of denying a demand for information, which cannot be acceded to, should be borne at the highest level—by the department head and even, if the matter is important enough, by the President.[51] It is unfair and unwise to expect a subordinate official to weather the congressional blast alone. Thus, if it can be predicted—as it frequently can be—that Senator So-and-So is going to demand from an official witness information which should not be disclosed, the witness should carry up to the Hill in his pocket a letter from the department head, describing in some detail the prohibited categories of information and instructing him to refer demands for such data—courteously—to the signer of the letter. If trouble is anticipated, the witness ought, moreover, to be accompanied by counsel. It takes a lawyer, and a fairly astute and cool-headed one at that, to deal with such maneuvers as vociferous insistence that a witness, barred from saying what he has done or will do in his official capacity in an actual case, give his "personal opinion" as to what ought to be done in a hypothetical case closely resembling the actual one. Another sound principle is to produce promptly, and publicize as widely as possible, all the germane facts (such as the context from which misleading excerpts have been torn) which *can* be released, together with an explanation of the reasons—which had better be good—for withholding the others. The *ruses de guerre* of the legislative *franc-tireurs* are, naturally, extremely varied, and certainly the author of this paper would not and could not attempt to catalogue them all; but it seems to be true, if banal, that the impact of most of them is minimized by maximum candor and disclosure on the part of the executive branch.

Conclusion

A situation so ambiguous and muddled cannot fail to distress the tidy-minded constitutionalist. And yet there is every prospect that it will continue for some time to come. For reasons given it is not likely soon to be cleared up by judicial decision. An act of Congress, even if it avoided or surmounted a presidential veto, would simply beg the question.[52] An amendment to the Constitution would at least meet the problem squarely; in view of the recent vogue of amendments designed to limit the powers of the executive, it is perhaps a matter of some surprise that none such has been seriously proposed. Perhaps this is so because, on the whole, a good case can be made out for the proposition that the present imprecise situation is, in fact, reasonably satisfactory. Neither the executive nor the Congress is very sure of its rights, and both usually evince a tactful disposition not to push the assertion of their rights to abusive extremes. Of such is the system of checks and balances.

51. *E.g.*, the Truman directive cited in note 46 *supra*, and the Eisenhower directive cited in note 45 *supra*.

52. In 1948 the House passed a Joint Resolution in substance purporting to require the executive to furnish to all House and Senate committees any information the committees might deem necessary. H.R.J. Res. 342, 80th Cong., 2d Sess. (1948); see 94 Cong. Rec. 5821 (1948). The Resolution died in the Senate.

Congressional Research Service

Washington, D.C. 20540

Appendix 9

August 25, 1975

TO : Honorable Michael Harrington
Attn: Rob Saltzman

FROM : American Law Division

SUBJECT: Legislative History of House Rule XI, §§2(e)(2) and 2 (k)(7)

This is in response to your request for a legislative history of §§2(e)(2) and 2(k)(7) of House Rule XI, dealing with access by Members of Congress to committee files.

As discussed with your office, no interpretative material was found in the course of these legislative histories. However, it is hoped the following information will be helpful.

House Rule XI, §2(e)(2), reads:

> "(2) All committee hearings, records, data, charts, and files shall be kept separate and distinct from the congressional office records of the Member serving as chairman of the committee; and such records shall be the property of the House and all Members of the House shall have access thereto."

This provision was originally §202(d) of the Legislative Reorganization Act of 1946 (60 Stat. 812). There was no House Report on this measure (S. 2177, 79th Congress), and the report of the Joint Committee on the Organization of Congress, which drafted many of the provisions which were included in the 1946 Legislative Reorganization Act, made no mention of this language in its discussion of Committee Hearings and Records:

5. Committee Hearings and Records

Recommendation: That all committees set aside monthly docket days for the public hearing of Members who have bills pending before them; that committees set regular meeting days for the consideration of such business as the committee determines; that complete records of all committee proceedings (except executive sessions) be kept; that attendance records be kept; and that a record of the votes of all Members on bills and amendments when a record vote is demanded be printed in the Congressional Record.

Criticism of conditions that handicap the individual Member of Congress as well as committee members was voiced in our hearings. These include the frequent inability of a Member of Congress to obtain a hearing on legislation which he has introduced.

Hundreds of bills introduced by Members of Congress are never considered even for a brief period by the committees to which they are referred. In order to get a hearing by the committee having their legislation in charge, Members must informally solicit committeemen for the privilege of even a brief cursory appearance. This tends to bottle up legislation originating in Congress itself, while the right-of-way is generally given to legislation originating in the executive departments.

To correct this sometimes arbitrary discrimination against the bills of Members of Congress and committeemen themselves, we propose that a regular period each month be set aside by the standing committees when Members who have introduced bills may appear and publicly explain them, outline their support, and ask the full committee to decide whether extended hearings shall be held.

In order further to facilitate self-rule by the committees, it is recommended that each standing committee fix regular weekly, biweekly, or monthly meeting days when the committee will be in session at stated hours for the transaction of any business that committee members themselves may determine. Extra meetings in addition to the regularly stated sessions would be called by the chairman.

All committees should be required to keep a complete record of all committee proceedings, except executive sessions. Such records would include the attendance of Members at committee sessions and the votes of all members of the committee on bills and amendments on which a record vote is demanded. Such record votes should be printed in the Congressional Record.

This provision appears to have received no discussion on the House floor during consideration of the bill (92 Congressional Record 10037-10104, July 25, 1946), or during Senate discussions (June 6-10, 1946). There was again no House Report and no applicable debate on the floor.

In his volume Deschler's Procedure, a summary of the modern precedents and practices of the House of Representatives in the 86th through 93rd Congresses, former House Parliamentarian Lewis Deschler gives certain examples of instances where this provision was employed to prohibit the discussion of executive committee transcripts on the House floor.

On June 3, 1960, a Member of the House requested that he be allowed to quote from materials he had filed with the Committee on House Administration in order to refute charges made against him in a newspaper article which had stated that he had improperly billed the Congress for personal expenses incurred on a fact-finding tour. It was held that he could not do so unless the Committee had specifically authorized the action (106 Congressional Record 11820).

On June 26, 1961, a Member attempted to paraphase a transcript of an executive session held by the House Public Works Committee, only to have a point of order raised that such action was improper. This led to the following exchange:

> MR. ALGER. Is it appropriate to announce to the Members they may see the transcript if they go to the Committee on Public Works?
>
> THE SPEAKER pro tempore: That is within control of the Committee.
>
> MR. ALGER. I am thinking of a certain section of the

> House Rules. . . that Committee executive meeting transcripts are available to any Member of the Congress who wants to see it.
>
> THE SPEAKER pro tempore. That is correct, but it is still within the jurisdiction of the Committee.
>
> (107 Congressional Record 11233)

When such use has been authorized, however, the transcripts may be freely quoted; see, for example, 113 Congressional Record 8411, April 5, 1967, in which information from an executive session of the Committee on House Administration was discussed in connection with a Resolution to establish a House Committee on Science and Astronautics (H. Res. 312).

Similarly, information which has been formally released by a Committee may be quoted without penalty; e.g., 118 Congressional Record 14348-14434, April 26, 1972, concerning the so-called "Pentagon Papers."

This language has not been amended since the date of its enactment.

With respect to §2(k)(7) ("No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee"), this provision was contained in H. Res. 151, 84th Congress, which established the investigative hearing procedures now found in House Rule XI, §2(k)(1) and §§2(k)(3) through 2(k)(8). The debate on this Resolution primarily concerned the rights of witnesses at such an investigative hearing and the requirement that the committee chairman in his opening statement announce the subject of the investigation. No references to section "o" of the

Resolution, the pertinent provision, were found in the course of debate (101 Congressional Record 35693585, March 23, 1955). The phrase has not been amended since its enactment.

Rita Ann Reimer
Rita Ann Reimer
Legislative Attorney

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Appendix 10

WASHINGTON, D.C. 20540

July 16, 1975

To: Honorable Michael Harrington
Attention: Mr. Rod Smith

From: American Law Division

Subject: Discussion of the Responsibilities of Members of Congress concerning access to and disclosure of classified information under House Rule XI (k)(7) and related matters.

This is in response to your request for a memorandum discussing questions related to the operation of House Rule XI (k)(7) and related matters.

House Rule XI (k)(7) provides "No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee." The legislative history does not provide any special guidance as to the meaning of the rule.

This rule has been construed on several occasions to prohibit public disclosure of evidence received by a congressional committee in executive sessions without the consent of the committee. (107 Cong. Rec. p. 11233 (June 26, 1961); 118 Cong. Rec. p. 14348-14434 (April 26, 1972)).

House Rule XI (2)(a) directs each standing committee of the House to adopt written rules governing its procedure which are not inconsistent with the Rules of the House. Pursuant to this authority, the House Committee on Armed Services adopted Rule 10 on February 27, 1973 governing the protection of classified security information received by the committee. Rule 10 of the committee provides in part that "All national security information

bearing a classification of secret or higher which has been received by the committee or a subcommittee of the Committee on Armed Services shall be deemed to have been received by the committee in executive session and shall be given appropriate safekeeping." Rule 10 further provides that "The chairman of the full committee shall establish such procedures as in his judgment may be necessary to prevent the unauthorized disclosure of any national security information received by the committee classified as secret or higher. Such procedures shall, however, insure access to this information by any member of the committee or any member of the House of Representatives who has requested the opportunity to review such material."

The Chairman of the Armed Services Committee promulgated the following rules on April 3, 1973 governing access and disclosure of classified information in the possession of the Armed Services Committee.

RULES OF THE HOUSE ARMED SERVICES COMMITTEE TO BE FOLLOWED BY MEMBERS OF CONGRESS WHO WISH TO READ CLASSIFIED INFORMATION IN THE COMMITTEE FILES:

(1) Classified information will be kept in secure safes in the committee rooms. Members will be admitted to the reading room (Room 2114-A) after inquiring of the Executive Secretary in Room 2120, extension 54151.

(2) Before receiving access to such classified information Members of Congress will be required to identify the document or information they desire to read, identify themselves to the staff member assigned and sign the Secret Information Sheet, if such is attached to the document.

(3) The reading room will be open during regular committee hours.

(4) Only Members of Congress may have access to such information.

(5) Such information may not be removed from the reading room, and a staff member will be present at all times.

(6) The staff member will maintain an access list (log) identifying the Member, the material and the time of arrival and departure of all Members having such access to such classified information.

(7) A staff representative will ensure that the classified documents used by the Member are returned to the proper custodian or to original safekeeping as appropriate.

(8) No notes, reproductions or recordings may be made of any portion of such classified information.

(9) The contents of such classified information will not be divulged to any unauthorized person in any way, form, shape or manner.

(10) The log will contain a statement acknowledged by the Member's signature that he has read the committee rules and will honor them.

It is apparent from Rule 10 that these procedures govern the access to classified committee files by Members of the Armed Services Committee as well as Members of the House generally.

Your inquiry asks for information concerning the scope of rule 9 established by the Chairman to govern access to and disclosure of classified information. Since Rule 4 provides that only Members of Congress shall have access to this confidential information, it would be argued that Members could only disclose this information to other Members or Congress. However, it would appear more plausible to argue that a Member who was himself authorized to examine the classified information could only divulge the information to a non-Member if the non-Member had been explicitly or implicitly authorized by the committee to receive such information. The Bolling report of the House Committee on Committees of the 93rd Congress had recommended that House staff undergo a formal security clearance before they could be authorized by a committee to have access to confidential information in the committee's possession. (H. Rept. 93-916, Part II, pp. 93-98, 93d Cong., 2nd Sess). Although this recommendation was not adopted by the House, the report reflects a concern of many House Members about the disclosure of classified information to unauthorized persons. Thus the question whether a Member could divulge classified information to his personal staff would appear to turn upon how explicit the committee authorization of such disclosure by a Member to his staff must be. In the absence of legislative history or prior precedents on this question, it would appear speculative to venture an answer.

In answer to your further question whether a House rule can remove a Member's responsibility to report criminal activity to the appropriate authorities, it would seem that a House rule on secrecy might not of itself abridge the operation of any criminal laws that would establish a legal duty or responsibility to report criminal conduct. But it may be questioned whether there is any criminal law which establishes a duty to report criminal conduct in the face of such internal House secrecy provisions authorized by Article I, section 5 of the Constitution. A Member might be faced with serious moral or ethical responsibility in such a situation even if there would be no strictly legal responsibility to disclose this information.

In response to your question on what sanctions are available to enforce House rule XI (k)(7) and related committee rules, it would appear that under Article I, Section 5 of the Constitution, the House could take various disciplinary actions against a Member which could include reprimand, censure, and even expulsion. There appears to be no specific precedent for imposing sanctions against a Member for the violation of House Rule XI (k)(7). Under House Rule X (4)(e), the House Committee on Standards of Official Conduct is authorized to investigate alleged violations of House rules, regulations or other standard if official conduct by a Member and to recomment such action as the Committee deems appropriate.

John T. Melsheimer
Legislative Attorney

§ 2255. Staff and assistance; utilization of Federal departments and agencies; armed protection.

The Joint Committee is empowered to appoint and fix the compensation of such experts, consultants, technicians, and staff employees as it deems necessary and advisable. The Joint Committee is authorized to utilize the services, information, facilities, and personnel of the departments and establishments of the Government. The Joint Committee is authorized to permit such of its members, employees, and consultants as it deems necessary in the interest of common defense and security to carry firearms while in the discharge of their official duties for the committee. (Aug. 1, 1946, ch. 724, § 205, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 957.)

§ 2256. Classification of information.

The Joint Committee may classify information originating within the committee in accordance with standards used generally by the executive branch for classifying Restricted Data or defense information. (Aug. 1, 1946, ch. 724, § 206, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 957.)

§ 2257. Records.

The Joint Committee shall keep a complete record of all committee actions, including a record of the votes on any question on which a record vote is demanded. All committee records, data, charts, and files shall be the property of the Joint Committee and shall be kept in the offices of the Joint Committee or other places as the Joint Committee may direct under such security safeguards as the Joint Committee shall determine in the interest of the common defense and security. (Aug. 1, 1946, ch. 724, § 207, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 957.)

SUBCHAPTER XVII.—ENFORCEMENT OF CHAPTER

PRIOR PROVISIONS

Provisions similar to those comprising this subchapter were contained in section 16 of act Aug. 1, 1946, ch. 724, 60 Stat. 773 (formerly classified to section 1816 of this title) prior to the complete amendment and renumbering of act Aug. 1, 1946 by act Aug. 30, 1954, ch. 1073, 68 Stat. 921.

§ 2271. General provisions.

(a) To protect against the unlawful dissemination of Restricted Data and to safeguard facilities, equipment, materials, and other property of the Commission, the President shall have authority to utilize the services of any Government agency to the extent he may deem necessary or desirable.

(b) The Federal Bureau of Investigation of the Department of Justice shall investigate all alleged or suspected criminal violations of this chapter.

(c) No action shall be brought against any individual or person for any violation under this chapter unless and until the Attorney General of the United States has advised the Commission with respect to such action and no such action shall be commenced except by the Attorney General of the United States: *Provided, however,* That no action shall be brought under section 2272, 2273, 2274, 2275, or 2276 of this title except by the express direction of the Attorney General: *And provided further,* That nothing in this subsection shall be construed as applying to administrative action taken by the Commission. (Aug. 1, 1946, ch. 724, § 221 as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 958, and amended Dec. 24, 1969, Pub. L. 91–161, § 5, 83 Stat. 445.)

AMENDMENTS

1969—Subsec. (c). Pub. L. 91–161 provided that nothing in this subsection should be construed to apply to administrative action taken by the Commission.

§ 2272. Violation of specific sections.

Whoever willfully violates, attempts to violate, or conspires to violate, any provision of sections 2077, 2122, or 2131 of this title, or whoever unlawfully interferes, attempts to interfere, or conspires to interfere with any recapture or entry under section 2138 of this title, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both, except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation shall, upon conviction thereof, be punished by imprisonment for life, or by imprisonment for any term of years or a fine of not more than $20,000 or both. (Aug. 1, 1946, ch. 724, § 222, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 958, and amended Dec. 24, 1969, Pub. L. 91–161, §§ 2, 3(a), 83 Stat. 444.)

AMENDMENTS

1969—Pub. L. 91–161 increased the maximum term of imprisonment from five years to ten years for the willful violation, or attempted violation of enumerated sections, and struck out the applicability of the death penalty for violation of the same offenses committed with the intent to injure the United States, or secure an advantage to any foreign nation.

EFFECTIVE DATE OF 1969 AMENDMENT

Section 7 of Pub. L. 91–161 provided that: "The amendments contained in sections 2 and 3 of this Act [amending this section and sections 2274–2276 of this title] shall apply only to offenses under sections 222, 224, 225, and 226 [this section and sections 2272, 2274, 2275, and 2276 of this title] which are committed on or after the date of enactment of this Act [Dec. 24, 1969]. Nothing in section 2 or 3 of this Act shall affect penalties authorized under existing law for offenses under section 222, 224, 225, or 226 of the Atomic Energy Act of 1954, as amended, committed prior to the date of enactment of this Act [Dec. 24, 1969]."

CROSS REFERENCES

Conspiracy to commit offense, see section 371 of Title 18, Crimes and Criminal Procedure.

Federal retirement benefits, forfeiture upon conviction of offense described hereunder, see section 8312 of Title 5, Government Organization and Employees.

Forfeiture of veterans' benefits upon conviction under this section, see section 3505 of Title 38, Veterans' Benefits.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2271 of this title and title 5 section 8312.

§ 2273. Violation of sections generally.

Whoever willfully violates, attempts to violate, or conspires to violate, any provision of this chapter for which no criminal penalty is specifically provided or of any regulation or order prescribed or issued under section 2095 or 2201 (b), (i), or (o) of this title shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both, except that whoever commits such an offense with intent to injure the

Appendix 12

Excerpts from the report of the Select Committee on Committees

95

Protection of National Defense Secrets and Intelligence

It is worth noting that some members of the select committee were especially concerned about the inherent problems of protecting some unusually sensitive kinds of national security information, such as those related to our own new technology, and to intelligence collection, special sources, codes, and identities of agents. Some such matters are under special safeguards of law and executive orders. This expressed concern did not relate to whether one committee was a better protector of sensitive information than another; rather, it was related to a belief that secrets are more likely to remain secret if they are exposed to the smallest possible number of individuals.

Obviously, this real concern clashes with another legitimate concern that the broad policy issues involved in new technology and in intelligence activities whose details now are closely held require consideration and review by those with responsibility for policies affected by their availability and activities.

The select committee believes the dangers of the real world are such as to require very close protection of some classes of defense secrets and intelligence activities. Public disclosure of certain of these items of information would be unwise and harmful even to the point of national peril. At the same time, the committee believes that national policy made by the Congress without the best information available would risk being faulty and even dangerous. The question of how to resolve these conflicting needs for closely held secrets and responsible participation in policy making is deserving of serious study by the whole Congress.

The select committee had no desire to change the existing Rules of the House of Representatives, which in principle make all its information available to every Member. The committee recognized that the practical application of such a rule on access is different from the stated principle and that this application can change only to a degree. But as the issues involved were discussed, it became evident that one of the primary reasons for problems on access to information in the House is that the institution has never faced the real issues involved. The hard fact is that if the highest officials of the executive branch who collect, interpret, and control sensitive information believe that sharing it with Congress will lead to its public disclosure, they will not make it available, even when committees go into executive session to receive such information.

There is also another special dilemma of information sharing between these independent branches of Government: While most classified matters of the greatest sensitivity are mutually agreed upon as requiring continued secrecy, a few crucial issues have been classified either because they conflict with the policies put forth by the President, or reflect events in some fashion embarrassing to executive branch agencies. Finally, there are matters legitimately considered secret by

both branches, but where changed circumstances of public policy require some extraordinary move to declassify, possibly over the objections of one branch.

A Proposal To Meet Problems of National Security Information

The select committee discussed whether to mandate new rules and their application in the reported House resolution, or whether merely to include a study of the problem in the appendix to this report. Its decision has been to take a middle ground. Because actual changes in the rules will require more study and debate than the present occasion makes available, and because the matter is simply too important to relegate to an appendix, the select committee includes these recommendations on access to and handling of classified information in the report itself.

The select committee strongly suggests that the House must take the initiative to create an orderly set of rules which govern the receipt, use, storage, and dissemination of national security information and intelligence. These rules should be designed in such a way as to give the same quality of protection as is afforded by the executive branch, but not to tie the hands of the House when overriding considerations of national policy require a change from the restrictions imposed on such information by its originators in the executive branch of Government. These exceptions will require the most careful consideration if the House is to receive sensitive information. As further thought will reveal, the issues are complex, and no abstract set of rules may cover every possible contingency in an unknown future.

To facilitate action by the House, the select committee recommends study of the draft language which follows this paragraph. Members of the select committee did not vote to approve this language as a concrete recommendation for enactment, or it would have been a part of the reported resolution. But it did reach a consensus that the language presented here would be a useful step in translating discussion from generalities to a number of specific issues, and hence it is offered to the House for serious consideration.

In clause 3 of Rule X, add the following new paragraph:

"( )(1) The Committee on Armed Services [, and] the Committee on Appropriations [, and the Committee on Foreign Affairs] shall each have a subcommittee on intelligence consisting of members appointed (without regard to seniority) by the Speaker with the concurrence of the chairman of the committee. Such subcommittees may meet separately on matters within the jurisdiction of their respective committees, or jointly on matters which are of common concern or affect the House generally.

"(2) The two [three] subcommittees meeting jointly shall constitute the special committee on intelligence, and as such shall have responsibility for (A) preparing and maintaining a manual to govern the protection of classified national security information, including

the provision of secure storage and the establishment of appropriate personal clearance procedures for staff employees of both committees and individual Members, (B) maintaining such central records as may be required to implement this paragraph, (C) maintaining such liaison with executive branch agencies as will expedite the orderly investigation of employees needing clearance, and contracting with executive branch agencies for field work and searches of files, and (D) otherwise providing for the effective conduct and administration of activities and procedures relating to the handling of classified information in the House under clause 5.

Insert in Rule X the following new clause (and renumber the succeeding clause accordingly):

"Handling of Classified Information

"5. (a) All information and data whether written or oral received by any committee or Member of the House which is classified Secret or higher as a national security matter by the originator shall be deemed to have been received in executive session, and shall be subject to all of the rules and procedures of the House which restrict the disclosure of activities conducted and matters presented in executive session. No such information or data shall be disclosed to any person other than a Member, except to those House employees who have been properly cleared and can demonstrate a need to have such information or data in the performance of their official duties as such.

"(b) Any Member or employee receiving such classified information or data shall be notified of its classification and the restrictions on its disclosure. If in the judgment of the person providing the information or data there is special sensitivity (or in the case of a Member receiving the information otherwise than in the normal course of his committee participation) the Member or employee may be required to sign an acknowledgement that he or she understands and will abide by the restrictions on disclosure.

"(c) Each Member or employee who receives or may receive classified national security information or data shall be provided with a security manual governing its use and protection, together with copies of applicable statutes on the protection of official secrets and penalties for unauthorized disclosure thereof. Such manual and the clearance standards and procedures for the House (which shall meet the same standards of protection as those applied in the executive branch) shall be prepared by the special committee on intelligence and concurred in by the Speaker and the minority leader.

"(d) House employees (whether on committee staffs or on personal staffs of Members), before they may receive or be exposed to classified national security information or data, must be cleared by a process of investigation and certification which is appropriate to the level of sensitivity involved, following the criteria which apply in the executive branch.

"(e)(1) When a Member receives classified national security information or data otherwise than in the course of his or her committee activities, and believes it is over- or under-classified, he or she may request of the special committee on intelligence that such information or data (in the House) be declassified, or reclassified at another level, as appropriate.

"(2) When a Member receives classified national security information or data in the course of his or her committee activities, and believes it is over- or under-classified, he or she may request consideration of a change in classification by the committee. If the committee by majority vote agrees to the change, it may request such change of the special committee on intelligence.

"(3) The special committee on intelligence, if it agrees with any change requested under subparagraph (1) or (2), shall report its agreement with such change to the Speaker and the minority leader, and if they concur, the change shall automatically be made. If the decision of the special committee or of the leadership is adverse to such change, an appeal may be taken to the floor, in closed door session, at the direction of a majority of any committee.

"(4) Prior to any action by a Member or committee or the special committee on intelligence with respect to the reclassification of any information or data under this subparagraph, such reclassification shall be requested of the originator of the information or data, with a response requested within a period of seven legislative days. Such action shall not be taken prior to the conclusion of such period except in case of an emergency requiring immediate consideration by the House.

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Appendix 13

on the day of the vote shall be closed to the public: *Provided,* That this provision shall not become effective until a similar rule is adopted by the Senate.

This clause was added on January 14, 1975 (H. Res. 5, p. —).

RULE XXIX.

SECRET SESSION.

§ 914. Secret session of the House.

Whenever confidential communications are received from the President of the United States, or whenever the Speaker or any Member shall inform the House that he has communications which he believes ought to be kept secret for the present, the House shall be cleared of all persons except the Members and officers thereof, and so continue during the reading of such communications, the debates and proceedings thereon, unless otherwise ordered by the House.

This rule, in a somewhat different form, was adopted in 1792, although secret sessions had been held by the House before that date. They continued to be held at times with considerable frequency until 1830. In 1880, at the time of the general revision of the rules, the House concluded to retain the rule, although it had been long in disuse (V, 7247; VI, 434).

The two Houses have legislated in secret session, transmitting their messages also in secrecy (V, 7250); but the House has declined to be bound to secrecy by act of the Senate (V, 7249). Motions to remove the injunction of secrecy should be made with closed doors (V, 7254). In 1843 a confidential message from the President was referred without reading; but no motion was made for a secret session (V, 7255).

Speech and Debate Clause does not broadly exempt that which the Privilege from Arrest Clause allows (i.e. that Members are subject to the operation of the ordinary criminal law), the Court nevertheless indicated that the former Clause was intended to protect the integrity of the legislative process and "assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Id.*, at 616. Moreover, this protection is broad enough to immunize Members "against prosecutions that directly impinge upon or threaten the legislative process." *Id.*

It is important to note that although a Member may be immune from the operation of the criminal law where his conduct is within the "sphere of legitimate legislative activity" (*Id.* at 624), the fact that a particular act in some way "relates to" the legislative process is not necessarily a justification for immunity. Protection under the Speech and Debate Clause is available only where the Member's act is "clearly a part of the legislative process—the *due* functioning of the process." *United States* v. *Brewster*, 408 U.S. 501, 515-516 (1972). The test for determining what conduct is within the protected "sphere of legitimate legislative activity" under the Speech and Debate Clause was stated by Justice White as follows:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberation." *United States* v. *Doe*, 455 F. 2d, at 760. *Gravel* v. *United States*, 408 U.S. 606, 625 (1972).

In light of these considerations it seems appropriate to suggest several types of conduct which, in the case of an individual Member having possession of a classified document, should be protected under the Speech and Debate Clause. The following list is not intended to be exhaustive:

(1) Any speech or debate on the Senate floor concerning the classified document.

(2) Any speech during a committee meeting, hearing, etc.

(3) Any reading from the classified document either on the Senate floor or in a committee meeting.

(4) Any speech concerning the classified document in committee reports, hearings, or in resolutions.

(5) Any placing of a classified document into the public record.

(6) Any conduct at a committee meeting or on the Senate floor with respect to the classified document and any motive or purpose behind such conduct.

(7) Any communications between a Member and aide during the

if related to a committee meeting or other legislative act of the Member.

As to those types of conduct for which it would seem no Speech or Debate Clause protection exists, the following, also not intended to be exhaustive, are illustrative:

1. Any act with respect to a classified document in preparation for a hearing which may be relevant to the investigation of third-party crime.

2. Any act with respect to a classified document in preparation for a hearing which is itself criminal, e.g., gathering defense information (18 U.S.C. Sec. 793).

3. Any act arranging for the private publication of a classified document.

4. Any act publishing a classified document privately.

5. Any speech or debate concerning the classified document delivered or conducted outside Congress; i.e., not in a committee meeting or on the Senate floor.

6. Any transmittal or communication concerning the classified document in newsletters or news releases to constituents or in answering constituent mail.

7. Any disclosure of the classified document on radio or television appearances.

Apart from any listing of acts and conduct which may be entitled to protection under the Speech and Debate Clause, another important aspect of the question concerning the legal rights of an individual Senator in possession of a classified document may be noted. The Court in *Gravel* indicated that it could not "perceive any constitutional or other privilege that shields . . . any . . . witness from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions." *Id.* at 628. This analysis, as subsequently reflected in the Court's final order (see *Id.*, at 629) presents a dilemma to an individual Member which has been summarized as follows:

> . . . [T]he decision in *Gravel* may make it impossible for a Congressman to promise confidentiality to a would-be informant: where the release of information could constitute a crime and could therefore be investigated by a grand jury, the decision forces a Congressman either to refuse to promise confidentiality or to risk a contempt charge in a subsequent grand jury investgiation. "The Supreme Court 1971 Term-Protection of Congressional Aides and Scope of Privileged Activity," 86 *Harv. L. Rev.* 189, 195 (1972).

It should be mentioned that the *Gravel* Court also determined that the scope of immunity available to a Member's aide under the Speech and Debate Clause is coextensive with that of the Member himself. That is, any act of a Member's aide with respect to a classified document which would constitute a protected legislative act if done by the Member himself, is also immunized under the Clause. The rationale for this equal treatment of Member and aide "is that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative

Excerpt from the report of the Senate's Special Committee to Study Questions Related to Secret and Confidential Government Documents

Appendix 15

A12 Tuesday, October 28, 1975 THE WASHINGTON POST

Rep. Harrington Case Recalls 1811 Censure

By Drew Von Bergen
United Press International

Michael Harrington is a rebellious son of Massachusetts, caught in a legislative vise between his conscience and the rules of Congress over unauthorized disclosure of secret government documents.

So was Timothy Pickering.

It was the winter of 1810, not 1975, but there is a striking similarity between the cases.

Pickering was a native of Salem, Mass.

So is Harrington.

Pickering graduated from Harvard and practiced law in Salem before entering politics.

So did Harrington.

On Dec. 31, 1810, Sen. Henry Clay of Kentucky introduced a resolution to censure Pickering for reading a secret government letter about a French-American treaty to a public session of the Senate.

On June 18, 1975, Rep. Robin Beard of Tennessee filed a complaint with the House Ethics Committee calling for "appropriate action" against Harrington for discussing with a newspaper reporter secret testimony about Central Intelligence Agency activities in Chile.

Harrington, a liberal Democrat, faces formal disciplinary hearings early next month that could lead to censure and even expulsion.

In Pickering's case, he was censured by a vote of 20 to 7. He then lost a bid for re-election, although he later served in the House.

"I hope we've come a long way in 170 years," Harrington said in a recent interview.

Like Harrington, who avoids the Washington cocktail circuit and is considered a loner even among his fellow liberals, Pickering had a rebellious past that precipitated his troubles in the Senate.

After taking part in the Revolutionary War, he served in the Cabinets of George Washington as Postmaster General, Secretary of War and Secretary of State.

He was held over when John Adams became President, but opposed Adams' effort to settle differences with France peacefully. In May, 1800, when he refused a request to resign from the Cabinet, Pickering was fired.

Pickering returned to Massachusetts and became senator in 1803.

He incurred the wrath of his colleagues when he took the Senate floor in December of 1810 and read a letter from Charles Maurice Talleyrand, the French minister of foreign affairs, to the U.S. minister at Paris.

According to Senate records, Talleyrand's letter purported to deny that the United States had acquired, by the Treaty of 1803, any title to Louisiana east of the Mississippi.

Backers of Clay's censure resolution contended Pickering violated Senate rules by reading a confidential communication sent the Senate by the President, "the injunction of secrecy not having been removed."

Despite the absence of any written Senate rule regarding confidentiality, Clay cited a general understanding that "all confidential communications made by the President of the United States to the Senate, shall, by the members thereof, be kept inviolably secret . . . ."

Two days after the resolution was introduced, on Jan. 2, 1811, Pickering was censured.

Harrington contends that violation of a House rule is not the issue in his case.

"The issue is not Michael Harrington," he said, "but the use of the CIA and government secrecy in general to short-circuit the democratic process and cover up illegal activity."

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Appendix 16

July 15, 1975

TO : Honorable Michael Harrington
Attn: Rod Smith or John Franzen

FROM : American Law Division

SUBJECT: Revelation of Classified Information by Members of Congress

In partial response to your request of June 30, we have prepared the attached report discussing the revelation of classified information by Members of Congress.

Rita Ann Reimer

Rita Ann Reimer
Legislative Attorney

THE LIBRARY OF CONGRESS

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WASHINGTON, D.C. 20540

July 16, 1975

REVELATION OF CLASSIFIED INFORMATION BY MEMBERS OF CONGRESS

In the nearly two hundred years of its existence, Congress has apparently only twice censured Members for revealing classified information. In each instance the Senate, rather than the House of Representatives, was involved (see: "Senate Election, Explusion, and Censure Cases from 1793-1972," Senate Document No. 92-7, 1972, cases number 10 and 20).

Senator Timothy Pickering was censured by the Senate on January 2, 1811, for having read a letter from the French Minister of Foreign Affairs, Charles Tallyrand, which had been confidentially sent to the Senate by the President.

The Resolution as adopted read, "Resolved, that Timothy Pickering, a Senator from the State of Massachusetts, having, on this day, whilst the Senate was in session with open doors, read from his place certain documents confidentially communicated by the President of the United States to the Senate, the injunction of secrecy not having been removed, has in so doing committed a violation of the rules of this body."

Although there was no written rule to point at that time, Senator Clay successfully argued the rule to be that, "All confidential communications made by the President of the United States to the Senate, shall, by the members thereof, be kept inviolably secret; and all the treaties which may hereafter be laid before the Senate shall also be kept secret until the Senate shall by their resolution take off the injunction of secrecy" (ibid, pp. 6-7).

Senator Benjamin Tappan was censored by the Senate on May 10, 1844, for having given a confidential letter from President Tyler, discussing the treaty providing for the annexation of Texas and received during an executive session, to another person to be transmitted for publication in the New York Evening Post.

Although the resolution which was originally considered would have expelled Senator Tappan for his "flagrant violation of the rules of the Senate and contempt of its authority," the final resolution of censure provided, "Resolved, that Benjamin Tappan, a Senator from the State of Ohio, in furnishing for publication in a newspaper documents directed by an order of the Senate to be printed in confidence for its use has been guilty of a flagrant violation of the rules of the Senate and disregard of its authority." A further resolution then adopted stated, "Resolved, That, in consideration of the acknowledgement and apology tended by the said Benjamin Tappan for his said offense, no further censure be inflicted on him" (ibid, pp. 13-14).

Throughout its existence, the House of Representatives has censured only 17 Members and one Delegate. Seven of these cases involved the use of unparliamentary language; two involved conspiracy to assault and assault upon another Member; two involved utterance of treasonable language; two involved insults to the House by the introduction of offensive resolutions; and five involved corrupt acts (see: "Precedents of the House of Representatives Relating to Exclusion, Expulsion and Censure," CRS Multilith 73-119A, by Robert L. Tienken, Senior Specialist in American Public Law, American Law Division, April 1973, p. 211. The 18 censure cases are discussed in detail on pp. 211-226).

There have, however, been instances where Members of Congress revealed classified information but no action was taken against them. Although difficult to document, the following representative cases have been found.

In 1941, Senator Burton K. Wheeler, an extreme isolationist, revealed the Navy's occupation of Iceland while the operation was still in progress and the ships involved were vulnerable to attack by enemy submarines (Bishop, "The Executive's Right of Privacy: An Unresolved Constitutional Question," 66 Yale Law Journal 477, February 1957, p. 486, fn. 41).

In 1971, Senator Mike Gravel read excerpts from top secret classified documents (the so-called Pentagon Papers) into the hearings record of a Subcommittee of which he was chairman. He was never censured or otherwise reprimanded for this action. In the case of Gravel

v. United States, 408 U.S. 606 (1972), the Supreme Court held that the congressional immunity which prevented the prosecution of Senator Gravel for his actions (Article I, §6, of the Constitution) applied similarly to a congressional employee insofar as the employee's conduct would be a protected legislative act if performed by the Member himself.

During the impeachment hearings held by the House Judiciary Committee, confidential transcripts of the White House tapes were released, along with a letter by White House speechwriter Patrick Buchanan in which he attempted to dissuade other White House employees from undertaking any attack against Daniel Ellsberg (Congressional Quarterly, June 22, 1974, p. 1603). Information was also leaked concerning Secretary of State Henry Kissinger and his alleged role in secret, illegal wiretapping activity (Congressional Quarterly, June 15, 1974, p.1541). Again, no action was taken against any of those responsible for these leaks.

In the recent case of Eastland v. United States Servicemen's Fund, _____U.S._____, 43 L.W. 4635, decided May 27, 1975, the Supreme Court employed extremely broad language in construing the scope of the Speech or Debate Clause as it applied to the Senate Subcommittee on Internal Security's investigation of the above service organization. The Fund had claimed its First Amendment rights were violated by a subpoena duces tecum served by the Subcommittee on the bank where the Fund maintained an account, ordering the bank to produce all records involving the account. The Supreme Court held that the activities of the Senate Subcommittee, the individual Senators, and the Chief Counsel of the Subcommittee fall within the "legitimate legislative sphere" of activity; and, once this

appears, these individuals are protected by the absolute prohibition of the Speech or Debate Clause against being "questioned in any other Place" and hence are immune from judicial interference:

> The question [14] to be resolved is whether the actions of the petitioners fall within the "sphere of legislative activity." If they do, the petitioners "shall not be questioned in any other Place" about those activities since the prohibitions of the Speech or Debate Clause are absolute, *Doe* v. *McMillan*, 412 U. S. 306, 312–313; *United States* v. *Brewster*, 408 U. S. 501, 516 (1972); *Gravel* v. *United States*, 408 U. S. 606, 623 n. 14 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 502–503 (1969); *Dombrowski* v. *Eastland*, 387 U. S. 82, 84–85 (1967); *United States* v. *Johnson*, 383 U. S. 169, 184–185 (1966); *Barr* v. *Mateo*, 360 U. S. 564, 569 (1959).
>
> Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes. *Kilbourn* v. *Thompson*, 103 U. S. 168, 204 (1881); *United States* v. *Johnson*, 383 U. S. 169, 179 (1966); *Powell* v. *McCormack*, 395 U. S. 486, 502-503 (1969); *United States* v. *Brewster*, 408 U. S. 501, 508–509 (1972); *Gravel* v. *United States*, 408 U. S. 606, 617–618 (1972); cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 376–378 (1951). The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently.

> "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States* v. *Brewster*, 408 U. S. 501, 507 (1971).
>
> In our system "the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States* v. *Johnson*, 383 U. S., at 178.

(Slip Opinion, pp. 9-10)

In 1948, an effort was made in H.J. Res. 342 to impose penalties (a fine not exceeding $1,000 or imprisonment not exceeding one year, or both) on any individual who divulged or made known in any manner whatever not provided by law any information provided to a committee by the Executive Branch which the committee had declared to be confidential. The main thrust of H.J. Res. 342 was to require all executive departments and agencies to make available any information to congressional committees when deemed necessary by the committees to enable them to properly perform their duties, and it was felt these penalties would reduce the likelihood of confidential information being released either intentionally or inadvertently.

Speaking in opposition to this Resolution, Rep. Lansdale Sasscer noted the possibility or even likelihood that some classified information would be released:

We say that the information may not get out. I have been in public life for a long time. I have been in conferences with numerous true and tried people, both within and without the Congress of the United States. But, my colleagues, if you are in a conference with over two or three people, no matter how sincere they may be, if the subject matter of the conference has to do with some matter or information which is secret and other information that is not secret, then after days go by, your recollection becomes dim as to what is secret and what is not secret. If the committee is entitled to this information, a colleague may ask you on the floor of the House what the information was, and you begin to rack your mind as to what was secret and what was not. Then it is only a short time before the information begins to seep out over your radio and through your news commentators.

In an age when it is necessary for these departments of our Government, the FBI, the Treasury Department, our Army and our Navy, to gather secret information, barriers should not be set up to stop the free flow of information to departments that might make vital use of it. By the passage of this legislation, we say to the citizens of our country, "If you give any information to an FBI agent or to an agent, perchance, investigating subversive activities or income-tax frauds, you may be revealed as the source of that information." If you say to citizens that information they give in secret to an investigator is not held inviolate, you have immediately made it extremely difficult to combat violations of law—to combat communism, if you will, because certainly American citizens are not freely going to give information which possibly for security reasons of their own or for fear of retaliation they might otherwise freely give to an agent for the use or for the good of the Government. The Government will not get such information if the persons who might give it know that a committee of the Congress may summon for any of these papers and the names of the various people who gave the information become known. It is going to make it extremely difficult to obtain not only secret information, but necessary information for carrying on the orderly processes of our Government.

A situation could have prevailed had this been law at the time—where the War Department could have been summoned and secret and confidential plans as to the time and place of the European invasion might have been obtained, with disastrous effect to invading forces.

****

> A secret investigation record which contained irresponsible statements as to the character of a person being investigated could, under this bill, be obtained by a committee of the Congress, and even though some of the statements given in the investigation were unproven and without foundation, but still a part of the file, if made public the unfounded statements would be dignified in the public mind as being a part of the public record or an FBI investigation.

(94 Congressional Record 5724-25; May 12, 1948)

Despite these reservations, the House approved H.J. Res. 342 by a vote of 219-142 (94 Congressional Record 5821; May 13, 1948). However, no Senate action was ever taken so the Resolution failed to become law.

On July 1, 1971, Rep. Charles Gubser introduced a constitutional amendment (H.J.Res. 764) which would have removed Speech or Debate Clause immunity from Members of Congress who disclosed classified information:

> A CONSTITUTIONAL AMENDMENT ON DISCLOSURE OF GOVERNMENT SECRETS AND CLASSIFIED INFORMATION
>
> (Mr. GUBSER asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)
>
> Mr. GUBSER. Mr. Speaker, today I am introducing a constitutional amendment which would place Members of the House and Senate in the same position as private citizens who publicly disclose Government secrets and classified information. I think it is time that we revoke the immunity given to Congressmen and Senators who take the right to declassify unto themselves and willfully disclose information classified as "top secret." I feel sure that the Founding Fathers only intended to protect Representatives and Senators from libel and slander based upon remarks made during the heat of debate.
>
> I do not believe they intended that Congressmen should have the right to disclose "top secret" information. In this area a Member of the House or Senate should be no better than a private citizen. They should be as liable for prosecution and suffer the same penalties as any other person.

(117 Congressional Record 23213-4)

No action was ever taken on this proposal.

House Rule XI, §27(c), reads in part, "All committee hearings, records, data, charts, and files shall be kept separate and distinct from the congressional office records of the Member serving as chairman of the committee....[A]ll Members of the House shall have access to such records." Our research found no recorded instances where a Member was refused access to committee records.

There have, however, been numerous instances where Members of Congress were denied access to information held by the Executive Branch on national security or numerous other grounds. These are cited throughout the transcript of the hearings held on "Executive Privilege: The Withholding of Information by the Executive," by the Separation of Powers Subcommittee of the Senate Judiciary Committee, on July 27, 28, and 29; and August 4 and 5, 1971 [hereinafter Executive Privilege hearings].

As noted by Senator Symington, "When I first wanted to go to Laos [in 1970], the [Laotian] Ambassador sent word he didn't want me to come because it was highly classified operation. So, I didn't go, even though I was a member of the Armed Services Committee and a member of the Foreign Relations Committee." Senator Symington eventually did travel to Laos, as did staff members of the Foreign Relations Committee.

His findings convinced him he should have disregarded the earlier request that he not come. (Executive Privilege hearings, pp. 225-226).

Senator Roth was given a lengthy list of reasons, lasting over a year, by the Department of Health, Education and Welfare, which explained

why they felt they should not comply with his requests for information necessary to compile a survey of all Federal domestic assistance programs. He eventually was given the information, after he received the assistance of other Members of Congress and the Bureau of the Budget (Executive Privilege hearings, pp. 5-6).

In a slightly different setting, Rep. Robert L. Condon was barred by the Atomic Energy Commission on security grounds from attending a classified briefing held in connection with the May 7, 1953, atomic test in Las Vegas, because of his alleged earlier Communist ties (Congress and the Nation, Vol. I, p. 1420; 99 Congressional Record 8790-92, July 14, 1953).

In this regard it should be noted that Members of Congress may be granted access to classified materials without having to undergo the normal security checks. However, congressional staff personnel must be cleared before they are permitted access to classified documents ("Developments in the Law - The National Security Interest and Civil Liberties," 85 Harvard Law Review 1130, March 1972, p. 1207; see also, "Security and Loyalty Clearances for Senate Employees," by Harold C. Relyea, Government and General Research Division, CRS, February 18, 1975).

With reference to prosecuting a Member of Congress who revealed classified information, our research again found no such cases. A Member who released such information in connection with his legislative duties would be protected from prosecution by the constitutional privilege of speech or debate (Article I, §6) (Gravel v. United States, supra, pp. 615-616). As noted by the Court with reference to Senator Gravel's claim that the speech or debate clause protected him from prosecution for having read classified documents into a subcommittee record,

> "To us this claim is incontrovertible. The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer--either in terms of questions or in terms of defending himself from prosecution--for the events that occurred at the subcommittee meeting" (ibid).

However, the Court did note that "Legislative acts are not all-encompassing" (id, at 625). For example, in this case, any arrangement Senator Gravel might have had with an outside, private publisher to publish the Pentagon Papers was held not to be legitimate legislative immunity and hence not covered by legislative immunity (id, at 622-627). Thus it is possible that a Member might find himself subject to prosecution for revealing classified information if such activity did not fall within the realm of a protected legislative sphere.

Mr. Bishop notes in his article ("The Executive's Right of Privacy: An Unresolved Constitutional Question," supra)that it has been held in at least two court cases that the judiciary cannot restrain Congress from publishing any information in its possession, because to do so would violate the separation of powers doctrine. As Mr. Bishop notes, "these cases involved the confidential information of private citizens, but the rationale seems applicable to information obtained from the executive" as well (p. 486).

In Hearst v. Black, 87 F.2d 68 (D.C.C. 1936), the Federal Communications Commission had without authorization made dragnet seizures of private telegrams sent from publisher Hearst to his employees.

The contents were then made known to a Special Senate Committee investigating lobbying. The court held that, under the separation of powers doctrine, it was without jurisdiction to restrain the Committee from keeping the messages, making use of them, or disclosing their contents:

> "The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded.... If courts cannot enjoin the enactment of unconstitutional laws--as to which proposition there can be no doubt--then by the same token they cannot enjoin legislative debate or discussion of constitutional measures because of the incidental disclosure or publication of knowledge unconstitutionally acquired."
>
> (ibid, pp. 71-72).

Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956) involved the publication by the Senate Internal Security Subcommittee of a pamplet, "The Communist Party of the United States--What It Is--How It Works--A Handbook for Americans," which identified the Methodist Federation for Social Action as a communist organization. The Federation sought to enjoin its publication. Again relying on the separation of powers doctrine, the Court held that nothing in the Constitution authorizes anyone to prevent the President, the Supreme Court, or the Congress from publishing any statement of its choice (ibid, p. 732).

Cannon's Precedents of the House of Representatives, Vol. V, §7249, gives an instance where the House refused to be bound by the Senate's declaration of secrecy, thus leading to the possibility of one House's revealing information considered by the other to be classified, again without repercussions.

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